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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

GARY O. BARLETT, in his official capacity as Executive Director of the State Board of Elections of the State of North Carolina; LARRY LEAKE, in his official capacity as Chairman of the State Board of Elections; S. KATHERINE BURNETTE, in her official capacity as Secretary of the State Board of Elections; JUNE K. YOUNGBLOOD, DOROTHY PRESSER, FAIGER M. BLACKWELL, in their official capacity as Members of the State Board of Elections; MICHAEL F. EASLEY, Attorney General of the State of North Carolina; COLON WILLOUGHBY, in his official capacity as District Attorney for the 10th Judicial District; WILLIAM H. ANDREWS, in his official capacity as District Attorney for the 4th Judicial District; and C. BRANSON VICKORY, III, in his official capacity as District Attorney for the 8th Judicial District,

Petitioners

v.

WILLIAM BRYANT PERRY; FARMERS FOR FAIRNESS, INCORPORATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MICHAEL F. EASLEY
North Carolina Attorney General
Susan K. Nichols*, Special Deputy Attorney General
Alexander McC. Peters, Special Deputy Attorney General
James Peeler Smith, Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6800

January 2, 2001

*Counsel of Record

113 pp

QUESTION PRESENTED

Whether *Buckley v. Valeo*, 424 U.S. 1 (1976), requires clarification that it permits a state to compel disclosure of expenditures for campaign advertising intentionally and admittedly designed to defeat a candidate when the advertising was carefully crafted to avoid using words of "express advocacy."

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PARTIES

Gary O. Bartlett, Larry Leake, June K. Youngblood, Dorothy Presser, Rose Vaughn Williams, and Dawn Baxton, in their official capacities as Executive Secretary-Director, Chairman, and members of the North Carolina State Board of Elections, and Michael F. Easley in his official capacity as Attorney General of North Carolina, and other defendant district attorneys are petitioners in this case and were defendants-appellants below;

Farmers for Fairness, Inc. ("Farmers Inc."), a trade association of corporations and individuals involved in the large-scale production of hogs, and William Bryant Perry, an individual who alleged that he benefitted from and wished to continue to benefit from advertisements sponsored by Farmers Inc. are respondents in this case and were plaintiffs-appellees below.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 231 F.3d 155 (4th Cir. 2000). The court of appeals issued a minor amendment to its opinion on November 20, 2000 (App. 23a). The opinion of the district court (App. 25a-34a) is reported at 1999 U.S. Dist LEXIS 5881 (E.D.N.C. 1999); the district court's opinion denying defendants' motion to reconsider is not reported (App. 35a-46a). The order of the North Carolina State Board of Elections (App. 47a-65a) is also not reported.

JURISDICTION

The court of appeals entered its judgment on October 3, 2000 (App. 67a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution (App. 69a), as applied to the states through the Fourteenth Amendment, and N.C. GEN. STAT. § 163-278.12A (App. 71a-72a).

STATEMENT OF THE CASE

A. Proceedings Below

Farmers Inc. began this action as a facial challenge to the constitutionality of two provisions of North Carolina's campaign finance statutes. The relief sought was an injunction prohibiting enforcement of an order entered by the North Carolina State Board of Elections ("State Board"), in which the State Board directed Farmers Inc. to make disclosures pursuant to N.C. GEN. STAT. § 163-278.12A. App. 65a. Farmers Inc. also challenged a second statute which the Fourth Circuit Court of Appeals found to be facially unconstitutional in a separate case after this action was filed. *See N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000) ("*NCRL*") (Certiorari was sought by *NCRL* on an issue unrelated to this case involving restrictions on contributions by registered lobbyists.). Ruling on cross-motions for summary judgment, the district court found the challenge to N.C. GEN. STAT. § 163-278.12A to be mooted by the Fourth Circuit's ruling in *NCRL*, but permanently enjoined the state from enforcing the statute.

The district court then denied petitioners' motion to reconsider the ruling on mootness.

Petitioners appealed, and the court of appeals held that the district court erred in ruling that the constitutionality of N.C. GEN. STAT. § 163-278.12A was mooted by *NCRL*. App. 9a-10a. The Fourth Circuit concluded that *Buckley v. Valeo* "requires the use of express or explicit words of advocacy of the election or defeat of a candidate before the communication may be regulated." App.10a. It noted that Farmers Inc. "acknowledges that the issue advocacy in which it engages can and does influence the outcome of elections." App. 7a. The court nevertheless viewed "allow[ing] the State of North Carolina to regulate political expression, which on its face is issue advocacy, when the speaker acknowledges an intent to influence the outcome of an election" as "abandon[ing] the rule of *Buckley*." App. 13a-14a.

B. Factual Background

The material facts are not in dispute. The State Board conducted an evidentiary, quasi-judicial hearing to investigate allegations by Representative ("Rep.") Cynthia B. Watson and Steven Rader that Farmers Inc. was conducting campaign activity, including media advertisements and polling, without complying with contribution limits and reporting requirements set forth in Article 22A of Chapter 163 of the North Carolina General Statutes. The facts found by the State Board in this hearing are detailed in its order issued on June 23, 1998 (App. 47a-65a). Those findings make clear that Farmers Inc.

aggressively undertook a sophisticated, well-financed attack campaign never before seen in legislative races in the "heart of hog country."

Farmers Inc. began running advertisements critical of members of the North Carolina House of Representatives, with particular emphasis on Rep. Watson[1] (App.48a, 56a-62a) early in the 1998 campaign season. Rep. Watson represented House District 10, located in a primarily agricultural area of the state. The organization was spending $10,000 a week in advertising in her district alone during the months before the hearing in April (App. 62a, ¶ 24). This staggering amount of advertising for a non-metropolitan area differed significantly from advertisements previously run in that it named particular elected officials who were also candidates for election. The advertisements critical of Rep. Watson saturated her district, being distributed on television, radio and in newspapers.

The advertisements did not expressly exhort the voter to take a particular electoral action. The advertisements were underpinned, however, by polling of 300[2] white registered voters in Rep. Watson's district, as well as additional polls of

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[1] Rep. Watson was defeated in the Republican primary held on September 15, 1998, for her legislative seat.

[2] Three hundred registered voters were more than Rep. Watson's margin of victory in each of two previous elections. She won by 64 votes in 1994 and 205 votes in 1996 (App. 48a, ¶ 1). Thus, she was obviously a vulnerable Republican candidate in 1998 when Republicans held a narrow majority of the North Carolina House of Representatives.

similar size and target audience about other candidates in those candidates' districts (App. 56a, ¶ 23). The pollster was told to terminate the poll "if the person called indicated either that he [was] not registered and intending to vote in the fall or that he was not white" (App. 56a, ¶ 23). Questions were asked such as, "Would you be more likely or less likely to vote for Cindy Watson for state legislature, if you knew it were true that she put her husband on the state payroll by having him work for her in her State Legislature Office?" (App. 58a-59a). The polls cost as much as $15,000 each (App. 56a, ¶ 23). The State Board found that these polls were intended to support or oppose specific candidates or potential candidates for the North Carolina House of Representatives (App. 64a).

In addition to the polls, the State Board found that the leadership of Farmers Inc. saw Rep. Watson's reelection as a consideration in singling her out for advertisements attacking legislators. The Executive Director of Farmers Inc. was quoted in a newspaper article at the start of the advertising as stating that "Rep. Watson's upcoming bid for re-election was also a consideration" in singling her out for advertisements that attacked legislators (App. 62a, ¶ 26) (quoting Aaron Hoover, "Hog lobby takes aim at Duplin legislator," *Wilmington Star-News* (Jan. 19, 1998) (App. ¶¶ 6, 25 & 26)). The State Board specifically found that Farmers Inc. had "manifested its intent to oppose the reelection of vulnerable Republican candidates" (App. 63a, ¶ 27). This determination has not been appealed or otherwise challenged; indeed, counsel for Farmers Inc. candidly acknowledged to the district court in the preliminary

injunction hearing that the purpose of the advertisements about Rep. Watson was to defeat her (App. 79a).

Based upon these findings, the State Board ordered Farmers Inc. to make the filings required by N.C. GEN. STAT. § 163-278.12A (App. 65a). The statute was a new, limited disclosure requirement enacted in 1997 in response to the growing use in North Carolina elections of what Justice Kennedy has labeled "covert speech." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, ___, 120 S. Ct. 897, 914, 145 L. Ed. 2d 886, 910 (2000) ("*Shrink*") (Kennedy, J. dissenting). It required disclosure of expenditures greater than $3,000 for advertising to the general public that names candidates or prospective candidates. The entity is not required to disclose the source of the funds spent on such advertising; it is merely required to disclosure these expenditures in reports to the board of elections. No disclosure is required for spending on "[m]aterial that is solely informational and is not intended to advocate the election or defeat of a candidate or prospective candidate."[3] The statute does not limit either the source of

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[3] N.C. GEN. STAT. § 163-278.12A provides in pertinent part:

> Any individual, person, political committee, or other entity that makes an expenditure for printed material or advertisements broadcast or distributed to anyone other than members of the entity shall report those expenditures in accordance with subsection (b) of this section if the printed material or advertisement names a candidate or names an individual whose prospective or potential candidacy is the principal purpose of a political

funding for the expenditures or the amount spent. It merely requires reports to be filed showing the amounts spent on election-related expenditures fitting the statutory criteria.

REASONS FOR GRANTING THE PETITION

In the years since this Court issued its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), Congress and the various state legislatures have struggled to enact legislation that respects the free speech protections of the First Amendment while at the same time exercises appropriate regulatory authority over advocacy of the election or defeat of specific candidates. In enacting N.C. GEN. STAT. § 163-278.12A, the North Carolina General Assembly sought to focus on a

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committee. The disclosure requirements of this section do not apply to the following:

> (1) Material that is solely informational and is not intended to advocate the election or defeat of a candidate or prospective candidate. . .

Under part (b) of this statute, reporting is only required of expenditures made by the entity for the described advertisements if an entity spends more than a threshold set in N.C. GEN. STAT. § 163-278.10A. The threshold amount was set at $3,000 as part of the legislation adopting N.C. GEN. STAT. § 163-12A in 1997. *See* 1997 N.C. SESS. LAWS ch. 1997-515, §§ 4(e) & 11(a) (1997) (App. 75a-76a, 77a-78a). No criminal liability is created by the statute, but civil penalties are imposed for late filings. N.C. GEN. STAT. § 163-278.12A(d) (App. 72a); N.C. GEN. STAT. § 163-278.34 (App. 73a-74a).

speaker's unambiguous intent as a means of determining whether the speaker was engaging in electoral advocacy. By striking down this statute as unconstitutional, the United States Court of Appeals for the Fourth Circuit misapprehended this Court's decision in *Buckley v. Valeo* and improperly curtailed a state's ability to impose valid and minimal disclosure requirements on electoral advocacy. It is important for this Court to clarify its holding in *Buckley v. Valeo* so that it is not used to defeat the public's valid interest in disclosure of monies spent on candidate advocacy. The question is whether the "bright line" of *Buckley v. Valeo* has so blinded lower courts that it has been extended in a way this Court never intended.

I. THE QUESTION PRESENTED IS IMPORTANT.

The ruling of the court of appeals was not mandated by *Buckley v. Valeo.* Its holding that the State of North Carolina may not even require minimal disclosure of monies spent on electoral advocacy when the entity conducting a sophisticated electoral campaign acknowledges its purpose is to defeat a candidate elevates form over substance. As Judge Green noted in *Federal Election Comm'n v. Christian Coalition*, 52 F. Supp. 2d 45, 59-60 (D.D.C. 1999), this Court has left open the questions of "whether 'express advocacy' is measured by the speaker's subjective intent or the recipient's objective understanding and whether context outside the communication itself may be considered when divining whether a communication's 'essential nature' transcends discussions of issues and public policy and enters the realm of express advocacy."

In *Buckley v. Valeo*, this Court was confronted with a federal statute that prohibited any person from making independent expenditures that advocated the election or defeat of a clearly identified candidate and that exceeded $1,000 in the aggregate during a calendar year. 424 U.S. at 39-40. The Court held that such a prohibition could be constitutional only if it were narrowly construed so as to apply only to "express advocacy" – "communications that in express terms advocate the election or defeat of a clearly identified candidate" – and not to advocacy on public issues.[4] *Id.* at 43-44. In a footnote, the Court said: "This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

By providing these examples, the Court was not acting out of a concern that "magic words" must be used in order to invoke government regulation. Rather, the Court was acting out of a concern that a speaker who intended to address only issues of public concern might inadvertently place himself under government regulation for electoral advocacy merely by using words that might erroneously be interpreted by some hearers as advocating electoral action.

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[4] The Court, of course, ultimately held the federal statute to be unconstitutional even under this narrow construction. *Buckley v. Valeo*, 424 U.S. at 44-51.

> "[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

Id. at 43, (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). In the context of the statute at issue in *Buckley v. Valeo* avoiding subjecting innocent speakers to regulation – avoiding "hedging" and "trimming" – meant requiring the use of words that unequivocally indicated express electoral advocacy.

In both *Thomas* and *Buckley v. Valeo*, questions both of intent and effect were raised. *Thomas*, 323 U.S. at 535; *Buckley v. Valeo*, 424 U.S. at 43. With regard to the question of effect, this Court warned against the danger of the "varied

understanding of [a speaker's] hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley v. Valeo,* 424 U.S. at 43; *Thomas*, 323 U.S. at 535. When the meaning and intent behind speech may be subject to various interpretations, some of which will result in regulation and some of which will not, the First Amendment requires a presumption that the speech will not be regulated. On the other hand, where explicit words or phrases like those listed in *Buckley v. Valeo*'s footnote 52 are used, then there is no ambiguity and the speech in question is subject to only one interpretation: a call to electoral action.

Buckley v. Valeo, then, in no way discounts or disregards the importance of a speaker's intent, nor does North Carolina's statute considering the intent of the speaker require an "exception" to the *Buckley v. Valeo* test, as the court below suggested. App. 1a-22a, 23a, 12a. Indeed, intent lies at the heart of the *Buckley v. Valeo* test, for the examples given in footnote 52 are simply examples of unequivocal and uncontrovertible indications that a speaker intends to advocate for electoral action; they are safeguards against the speaker being "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley v. Valeo* , 424 U.S. at 43.

It was not the intent of *Buckley v. Valeo*, however, to tie a state's ability to impose even minimal disclosure requirements or other regulation to the speaker's use or avoidance of any particular words such as those in footnote 52.

This is clearly shown in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), the only case in which this Court has applied the express advocacy test to specific facts. In *MCFL*, an entity distributed a pro-life newsletter identifying every candidate for state and federal office and listing each candidate's view on pro-life issues. *MCFL* disclaimed that the newsletter "represent[ed] an endorsement of any particular candidate," but urged the reader to "vote pro-life." *Id.* at 243. Nevertheless, this Court looked not to any specific words used but rather to the "essential nature" of the advertisement and concluded the newsletter contained express electoral advocacy:

> The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact.

Id. at 249. In *MCFL*, this Court found the express language advocating that the reader vote for pro-life candidates overrode the disclaimer when it determined the newsletter had engaged in express advocacy. Conversely, the absence of express language of advocacy can be overridden in a manner completely consistent with *Buckley v. Valeo* if an entity admits

the purpose of the advertisements it runs is to defeat a candidate. *MCFL* stands for the proposition that no statement of a speaker need be considered in isolation; rather, they all must be considered to determine whether a speaker is subject to disclosure requirements.

While a number of lower courts have held that express electoral advocacy is required before a communication may be regulated,[5] none of these cases involved situations in which the speaker acknowledged "up front" the intent underlying attack advertisements was to defeat a candidate although the advertisements avoided explicit electoral advocacy. "Issue advocacy," or "advertisements that promote or attack a candidate's position without specifically urging his or her election or defeat," *Shrink*, 528 U.S. at ____, 120 S. Ct. at 914, 145 L. Ed. 2d at 910, has become a major component of modern electioneering.[6] The problem of electoral advocacy

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[5] *See, e.g., Federal Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1056-57 (4th Cir. 1997); *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 471-72 (1st Cir.), *cert denied sub nom Federal Election Comm'n v. Keefer*, 502 U.S. 820 (1991); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998).

[6] The Annenberg Public Policy Center has done a series of studies demonstrating that issue advertisements is growing dramatically. In a study issued on March 17, 2000, the Center announced findings that spending for issue advertising in the presidential and congressional races in 2000 had already almost equaled the entire amount spent the 1995-1996 campaign even though the election was eight months away. Moreover, the

masquerading as issue advocacy has been the subject of academic commentary with varying proposals for addressing the public's desire for disclosure of spending for such advocacy. *See, e.g.*, Richard Briffault, Symposium: *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L. Rev. 1751 (1999); Anthony Corrado, Symposium Commentary: *On the Issue of Issue Advocacy: A Comment*, 85 Va. L. Rev. 1803 (1999) (endorsing disclosure of significant spending on candidate-specific issue advocacy); Glenn J. Moramarco, Article: *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 Cath. U.L. Rev. 107, 126-128 (1999)(advocates self-disclosure of electioneering advertisements, arguing voluntary truthful compliance would be likely because in the interests of those making disclosure); Becky Cain, Perspective: *Sham Issue Ads: Solutions to a Clear Record of Abuse*, 10 Stan. L. & Pol'y Rev. 71, 72 (1998) ("Only a space alien, or a campaign finance attorney, could believe that a barrage of these ads immediately preceding an election does not seek to elect or defeat specific candidates.") (Author served as 14th President of League of Women Voters of the United States).

Several states have enacted statutes or administrative rules regulating electioneering even in the absence of express

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advertisements in 2000 were more likely to attack candidates rather than advocate or contrast candidates, issues, or legislation. *See, e.g.*, Sean Aday, *Issue Advocacy Advertising During the Early 1999-2000 Election Cycle* (Mar. 17, 2000) (Annenburg Public Policy Center of the University of Pennsylvania) (http://www.appcpenn.org/issueads/2000issuead.html).

words of advocacy. These statutes have generally been struck as constitutionally overbroad. *See, e.g., Iowa Right to Life Comm., Inc. v. Williams,* 187 F.3d 963, 969 (8th Cir. 1999) (rule found wanting because its focus was "on what reasonable people or reasonable minds would understand by the communication"); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller,* 21 F. Supp. 2d 740, 746 (E.D. Mich. 1998) (regulation impermissibly prohibited use of general corporate treasury funds for communications that used the name or likeness of a candidate 45 calendar days before an election, with the court noting the regulation "reaches non advocacy and speech which is merely informational in nature"); *West Virginians for Life, Inc. v. Smith,* 960 F. Supp. 1036, 1039-40 (S.D. W.Va. 1996)(statute presumed all voter guides distributed within 60 days of an election was engaging in express advocacy).

Section 163-278.12A of the North Carolina General Statutes is different from the statutes discussed above in that it provides an exemption from disclosure for "[m]aterial that is solely informational and is not intended to advocate the election or defeat of a candidate or prospective candidate." It is directed at entities that may not qualify as a political committee but that intend to advocate the election or defeat of a candidate in advertisements to the public. The use of express advocacy in the advertisement undoubtedly will be the primary way of determining the intent behind the advertisement. Absent words of advocacy, in most cases there is no basis of concluding that the intent of the advertisement is to support or oppose a candidate. *See, e.g., Federal Election Comm'n* v.

Christian Action Network, 110 F.3d 1049 (4th Cir. 1997). But if the entity sponsoring the advertisements states, through a representative authorized to make such statements, that the intent of the advertisement is to advocate the election or defeat of a candidate, then the statute properly requires disclosure of what was spent on the advertisement. In such an instance, there simply is no danger of the speaker being "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley v. Valeo*, 424 U.S. at 43. There is no such danger because, just as when words of express advocacy are used in an advertisement itself, the intent and meaning of the speaker has been made unambiguously clear to the public.

In this case, the polling targeted to the candidate's district and directed at persuading those polled to vote against the candidate may also have been a proper basis for concluding that the advertisements run in conjunction with those polls were intended to defeat the candidate. Again, the determination of intent would be based on all the official statements and activities of the organization, not just the language used in the advertisements without regard to the other statements and activities of the organization. To allow such statements of intent and activities demonstrative of intent to be considered in deciding whether expenditures for advertisements need to be disclosed does not make a statute unconstitutionally overbroad. Neither *Buckley v. Valeo* nor the First Amendment requires a court to pretend an advertisement has an intent other than the stated intent of its sponsor. Section 163-278.12A of the North Carolina General Statutes merely takes a small step toward

precluding the exaltation of form over substance and toward the elimination of "covert speech" from the electoral process. It at least reduces blatant contempt for the law evidenced when entities deny that they are subject to any campaign finance regulation because they are engaging only in a debate on the issues, but brag to the press, to potential adversaries, and to potential supporters in press conferences and fund raising letters about their success in defeating or electing specific candidates. It may also ameliorate the loss of the public's faith in the integrity of the election process. Finally, and most importantly, it provides information from which voters can better assess the constituencies supporting or opposing a candidate for election.

The balance between a speaker's rights under the First Amendment and a state's compelling interest in assuring fair, free, and open elections is of the utmost importance, lying as it does at the very heart of our democracy. Indeed, this Court has recognized that "[d]isclosure of the names of initiative sponsors, and the amounts they have spent gathering support for their initiatives, responds to [the] substantial state interest" in checking the "domination of the initiative process by affluent special interest groups." *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 202-03 (1999). Although the Court struck certain disclosure requirements of the Colorado statutes, it upheld disclosure filings by the proponent of the initiative and how much the proponent had spent. "Through the disclosure requirements that remain in place, voters are informed of the source and amount of money spent by proponents to get a measure on the ballot; in other words,

voters will be told 'who has proposed [a measure],' and 'who has provided funds for its circulation.'" *Id.* at 203 (O'Connor, J., concurring in judgment in part and dissenting in part). The need for disclosure is just as great, if not greater, with respect to candidates. As this Court stated in *Buckley v. Valeo,*

> [T]he disclosure provisions . . . serve another, informational interest, and even [construed to cover only expenditures that expressly advocate an election result] increases the fund of information concerning those who support the candidates. It goes beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors. . . . The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies.

424 U.S. at 81. Thus, providing information to the voters is seen as a vital tool for promoting the compelling governmental interest in assuring that information is available for voters to make informed choices about candidates, based in part on information about those who advocate against the candidates.

North Carolina has, as do all states, an unquestionable and compelling interest in disclosure such as the minimal disclosure required by N.C. GEN. STAT. § 163-278.12A. The minimal requirement at issue in this case was enacted with dutiful recognition of the holdings of this Court and of the United States Court of Appeals for the Fourth Circuit, and it is in complete accord with this Court's decision in *Buckley v. Valeo*. The effect of the decision below is to deprive North Carolina and other states, of the ability to protect the public's interest in electoral information in a manner that does not infringe upon First Amendment rights.

II. THE DECISION OF THE COURT OF APPEALS IS INFORMED BY AN ERRONEOUS UNDERSTANDING OF *BUCKLEY V. VALEO*.

The decision of the Court of Appeals was not only not required by *Buckley v. Valeo*, but was actually contrary to the holding and the spirit of *Buckley v. Valeo*. The import of this error extends beyond a single statute in North Carolina – it affects in a direct way all efforts by legislatures of states within the Fourth Circuit to diminish the detrimental effects of "covert speech." In an indirect way, it affects such efforts across the country.

Decisions such as the one below distort *Buckley v. Valeo* and encourage what Justice Kennedy has called "covert speech" – "political speech [forced] underground, as contributors and candidates devise ever more elaborate methods of avoiding" otherwise valid regulation, the preferred

method of which "has been to conceal the real purpose of the speech." *Shrink*, 528 U.S. at ___, 120 S. Ct. at 914, 145 L. Ed. 2d at 910 (Kennedy J. dissenting). Such underground speech, crafted so as to conceal its real purpose, is precisely the kind of speech that the minimal disclosure requirements of N.C. GEN. STAT. § 163-278.12A are intended to address. The disclosure required by this statute unquestionably aids the public in evaluating a candidate's constituency. Moreover, it is completely consistent with *Buckley v. Valeo*. If the decision is allowed to stand, North Carolina and other states will be forbidden to legislate so as to protect a recognized compelling interest. This prohibition will be predicated on the misapprehension of *Buckley v. Valeo* that "magic words" are required in order to impose governmental regulation and disclosure, rather than *Buckley v. Valeo*'s actual concern for unambiguously discerning a speaker's intent to engage in electoral advocacy before governmental regulation and disclosure requirements can be imposed. Allowing the Fourth Circuit's extrapolation of *Buckley v. Valeo* to stand "denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance." *Shrink*, 528 U.S. at ___, 120 S. Ct. at 913, 145 L. Ed. 2d at 909 (Breyer, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Susan K. Nichols*
Special Deputy Attorney General

Alexander McC. Peters
Special Deputy Attorney General

James Peeler Smith
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6800
Counsel for Petitioner

* Counsel of Record

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OPINION, 231 F.3D 155 (4TH CIR. 2000)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM BRYANT PERRY; FARMERS FOR FAIRNESS, INCORPORATED,
Plaintiffs-Appellees,
v.
GARY O. BARTLETT, in his official capacity as Executive Director of the State Board of Elections of the State of North Carolina; LARRY LEAKE, in his official capacity as Chairman of the State Board of Elections; S. KATHERINE BURNETTE, in her official capacity as a Secretary of the State Board of Elections; JUNE K. YOUNGBLOOD; DOROTHY PRESSER, in her official capacity as a Member of the State Board of Elections; FAIGER M. BLACKWELL, in his official capacity as a Member of the State Board of Elections; MICHAEL F. EASLEY, in his official capacity as Attorney General for the State of North Carolina; COLON WILLOUGHBY, in his official capacity as District Attorney for the 10th Judicial District; WILLIAM H. ANDREWS, in his official capacity as District Attorney for the 4th Judicial District;

No. 99-1955

C. BRANSON VICKORY, III, in his official capacity as District Attorney for the 8th Judicial District,
Defendants-Appellants,
and

DONALD M. JACOBS,
Defendant.

WILLIAM BRYANT PERRY; FARMERS FOR FAIRNESS, INCORPORATED,
Plaintiffs-Appellees,
v.
GARY O. BARTLETT, in his official capacity as Executive Director of the State Board of Elections of the State of North Carolina; LARRY LEAKE, in his official capacity as Chairman of the State Board of Elections; S. KATHERINE BURNETTE, in her official capacity as a Secretary of the State Board of Elections; JUNE K. YOUNGBLOOD;
DOROTHY PRESSER, in her official capacity as a Member of the State Board of Elections;
FAIGER M. BLACKWELL, in his official capacity as a Member of the State Board of Elections; MICHAEL F. EASLEY, in his official capacity as Attorney General for the State of North Carolina; COLON WILLOUGHBY, in his official capacity as District Attorney for the 10th Judicial District; WILLIAM H. ANDREWS, in his official capacity as District Attorney for the 4th Judicial District;

No. 99-2127

C. BRANSON VICKORY, III, in his official capacity as District Attorney for the 8th Judicial District,
Defendants-Appellants,
and
DONALD M. JACOBS,
Defendant.

WILLIAM BRYANT PERRY; FARMERS FOR FAIRNESS, INCORPORATED,
Plaintiffs-Appellants,
v.
GARY O. BARTLETT, in his official capacity as Executive Director of the State Board of Elections of the State of North Carolina; LARRY LEAKE, in his official capacity as Chairman of the State Board of Elections; S. KATHERINE BURNETTE, in her official capacity as a Secretary of the State Board of Elections; JUNE K. YOUNGBLOOD;

DOROTHY PRESSER, in her official capacity as a Member of the State Board of Elections; FAIGER M. BLACKWELL, in his official capacity as a Member of the State Board of Elections; MICHAEL F. EASLEY, in his official capacity as Attorney General for the State of North Carolina; COLON WILLOUGHBY, in his official capacity as District Attorney for the 10th Judicial District; WILLIAM H. ANDREWS, in his official capacity as District Attorney for the

No. 99-2148

4th Judicial District; C. BRANSON VICKORY, III, in his official capacity as District Attorney for the 8th Judicial District,
Defendants-Appellees,
and

DONALD M. JACOBS,
Defendant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. W. Earl Britt, Senior District Judge. (CA-98-43-2-BR)

Argued: April 4, 2000
Decided: October 3, 2000

Before HAMILTON, Senior Circuit Judge, John C. GODBOLD, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation, and David A. FABER, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published per curiam opinion.

COUNSEL

ARGUED: Susan Kelly Nichols, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants. Heidi Karin Meyer, BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellees. **ON BRIEF:** Michael F. Easley, North Carolina Attorney General, Alexander McC. Peters, Special Deputy Attorney General, James Peeler Smith, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants. James Bopp, Jr., James R. Mason, III, BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellees.

OPINION

PER CURIAM:

Appellees Farmers for Fairness, Inc. and William Bryant Perry (collectively "Farmers"), filed suit in federal court challenging certain provisions of the North Carolina election and campaign finance law and seeking declaratory and injunctive relief. Although determining that the question of the constitutionality of N.C. Gen. Stat. S 163-278.12A was moot following this court's decision in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), the district court nevertheless enjoined the State of North Carolina from enforcing the statute

against plaintiffs. North Carolina appeals from the judgment of the district court, as well as certain portions of the attorneys' fee awarded to plaintiffs. Farmers cross-appeals the denial of certain attorneys' fees and expenses. For reasons expressed more fully below, we affirm.

I.

Farmers is a nonprofit organization, incorporated and doing business in the State of North Carolina. Its purpose is to educate the public, officeholders, and candidates on issues relating to the agricultural and farming industries.[1] In furtherance of effectuating this purpose, Farmers provides the public with candidates' and/or officeholders' positions on issues affecting agriculture and farming. Farmers does not purport to nominate, elect, or defeat candidates. While Farmers does make expenditures that may incidentally influence the results of an election, it does not in explicit words or by express terms advocate the election or defeat of a candidate. "In other words, [Farmers] does not engage in 'express advocacy' – advocacy 'that in express terms [calls for] the election or defeat of a clearly identified candidate for office.'" *North Carolina Right to Life*, 168 F.3d at 708 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (per curiam)). Farmers does, however, engage in issue advocacy, in the form of dissemination to the public of information regarding the positions of candidates

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[1] According to the allegations in the complaint, Perry is a person who has benefitted from, and would like to continue to benefit from, communications from Farmers. (J.A. 32, ¶ 32).

and/or officeholders. Farmers acknowledges that the issue advocacy in which it engages can and does influence the outcome of elections.

In particular, Farmers purchased advertising that was critical of certain members of the North Carolina House of Representatives, in particular, Rep. Cynthia Watson and Rep. Steven Rader. The advertisements named particular officials who were candidates for election, but did not expressly exhort voters to take a particular electoral action. Along with the advertisements, Farmers commissioned polling that included "push" questions (questions designed to convey a negative impression of the candidate).

After receiving complaints from Watson and Rader, the State Board of Elections conducted a hearing in April of 1998. The Board found that Farmers had acted with the intent to oppose the re-election of certain Republican candidates, and was therefore in violation of the reporting requirements contained in N.C. Gen. Stat. § 163-278.12A ("Section 12A").[2] The Board

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[2] The statute provides, in pertinent part:

> Any individual, person, political committee, or other entity that makes an expenditure for printed material or advertisements broadcast or distributed to anyone other than members of the entity shall report those expenditures in accordance with subsection (b) of this section if the printed material or advertisement names a candidate or names an individual whose prospective or potential candidacy is the principal purpose of a political committee. The disclosure requirements of this section do not apply to the following:

entered an order on June 23, 1998, requiring Farmers to register as a political committee and to make the filings required under Chapter 163 of the North Carolina General Statutes.

Farmers filed an action in federal court challenging as facially unconstitutional Section 12A and § 163-278.6(14) ("Section 14")[3] of the state election statute. Section 12A requires disclosure when an advertisement names a candidate, but does not apply if the material is solely informational and is not intended to advocate the election or defeat of a candidate. Section 14 defines a "political committee," which in turn triggers a series of potential penalties. Farmers claims that both sections of the statute are overbroad and therefore unconstitutional. Farmers sought both a temporary restraining order ("TRO") and a preliminary injunction against enforcement of the laws, and both were denied by the district court. Farmers filed an interlocutory appeal of the denial of the preliminary injunction.

> (1) Material that is solely informational and is not intended to advocate the election or defeat of a candidate or prospective candidate; or . . . .

N.C. Gen. Stat. § 163-278.12A.

[3] Section 14 defines political committee as "a combination of two or more individuals, or any person, committee, association, or organization, the primary or incidental purpose of which is to support or oppose any candidate or political party or to influence or attempt to influence the result of an election . . . ." N.C. Gen. Stat. § 163-278.6(14).

Both parties filed motions for summary judgment in December of 1998. Shortly thereafter, this court issued its opinion in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999). In that opinion, this court struck down Section 14 of the state election law, finding that the definition of political committee was unconstitutionally vague and overbroad.

Based on the *NCRL* decision, the district court found that the question of the constitutionality of Section 12A was moot. Notwithstanding the mootness determination, the court permanently enjoined the State from enforcing Section 12A against Farmers. The district court denied the State's motion to reconsider the question of mootness, and went on to award attorneys' fees and expenses to Farmers in July of 1999.

The State appeals the finding that the constitutionality of Section 12A is moot, and it also appeals that portion of the attorneys' fee award attributable to work done on the unsuccessful interlocutory appeal. Farmers cross-appeals the denial of certain fees and expenses that they requested.

II.

The district court erred in ruling that the constitutionality of Section 12A was mooted by the *NCRL* decision. As both the State and Farmers pointed out, Section 12A could still be applied to Farmers notwithstanding this court's decision enjoining the State Board from applying Section 14. By its own terms, Section 12A applies to "[a]ny individual, person, political committee, or other entity . . . ." Farmers meets the

requirements for inclusion not only as an "entity," but also as a "person." Therefore, the district court's failure to reach the question of the constitutionality of Section 12A on mootness grounds was erroneous. However, because the question is purely a legal one, a remand is unnecessary and this court will reach the constitutional question.

III.

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). In an effort to alleviate uncertainty, the Supreme Court adopted a bright-line rule to determine when political expression may be regulated. This bright-line rule requires the use of express or explicit words of advocacy of the election or defeat of a candidate before the communication may be regulated. *See Buckley* at 42.

The *Buckley* Court noted that "the distinction between discussion of issues and candidates and advocacy of issues and candidates may often dissolve in practical application." *Id.* at 42. The Court therefore refused to adopt a standard allowing regulation of any advertisement that mentions a candidate's stand on an issue. *See id.* at 42-43. In a footnote, the Court

provided an illustrative list of the terms that qualify as "express words of advocacy": "'vote for,' 'elect,' 'support,' 'cast you ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,'" *Id.* at 44.

The Fourth Circuit has steadfastly adhered to the bright-line "express advocacy" test from Buckley. In *Federal Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997), the court upheld an award of attorneys' fees to the Christian Action Network ("CAN") in a case where the FEC challenged a CAN ad identifying then-Governor Clinton's position on gay rights in a negative fashion, but did not use words of "express advocacy." The court, interpreting *Buckley*, stated that "[t]he Court opted for the clear, categorical limitation, that only expenditures for communications using explicit words of candidate advocacy are prohibited . . . ." *Id.* at 1051. The court therefore rejected the FEC's position that "express advocacy" could be established by looking at a group's use of imagery, rhetoric, and symbols in criticizing a candidate's position. *See id.* at 1064.

Other courts applying *Buckley* have also required express words of advocacy before allowing government regulation of campaign speech. *See, e.g., Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) ("Questions of intent and effect, however, are to be excluded from the [express advocacy] analysis, since a speaker, in such circumstances, could not safely assume how anything he might say would be understood by others."); *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 472 (1st Cir. 1991) ("In our view, trying to

discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the brightline express advocacy test in *Buckley*."); *Federal Election Comm'n v. Christian Coalition*, 52 F. Supp. 2d 45, 61 (D.D.C. 1999) (holding that under the "express advocacy" test, the communication "must in effect contain an explicit directive," whose effect "is determined first and foremost by the words used"). It is therefore clear that courts have only allowed regulation of campaign speech when there are words of express advocacy in the communication itself.

On its face, Section 12A does not allow regulation of issue advocacy so long as it "is not intended to advocate the election or defeat of a candidate or prospective candidate." However, if the intention of the communication is the election or defeat of a candidate, the statute would require financial disclosure. The State readily admits that Farmers' communications in and of themselves are not "express advocacy" of the kind described in *Buckley*. The State, however, argues that if an entity admits that the purpose of the advertisement is to defeat a particular candidate, regulation of that entity is constitutional under *Buckley* even if the advertisement itself does not contain words of express advocacy. The State does not cite any authority in support of its theory. In essence, the State is asking this court to recognize an exception to the "express advocacy" test when the entity admits, outside of the advertisement, that it is trying to defeat a particular candidate.

The State's position is undermined by *Buckley* and its progeny. The Supreme Court developed the express advocacy test to focus a court's inquiry on the language used in the communications; any other test would leave the speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley*, 424 U.S. at 43. In addition, circuit decisions applying Buckley have categorically rejected any attempt to dilute the bright-line express advocacy standard.

Furthermore, under the State's proposed test, it is unclear which statements of intent made outside the context of an advertisement would leave the entity subject to regulation under North Carolina law. For example, a court would have to decide whether a statement made by the head of an organization that its ad "was intended to defeat candidate X" was enough to impute intent to the organization; in addition, some members of an organization may admit that an ad "was intended to defeat candidate X" while others in the organization may claim that the intent of the ad was to focus on a particular issue.

Discerning the "intent" of an organization thus can be problematic, even if some in the organization "admit" their intent in running the ad. Certain groups might be disinclined to engage in political speech, fearful that someone in the group would make a public statement of the group's intent in a particular ad, thus subjecting the group to regulation. We therefore would create a legal standard that would be the antithesis of the bright-line express advocacy test developed in *Buckley*. Consequently, we decline the State's offer to abandon

the rule of *Buckley* and to allow the State of North Carolina to regulate political expression, which on its face is issue advocacy, when the speaker acknowledges an intent to influence the outcome of an election. Because Section 12A would allow the regulation of issue advocacy wherein the speaker has manifested an intent to advocate the election or defeat of a candidate, it is unconstitutionally overbroad and the State is permanently enjoined from enforcing it.

IV.

The State next argues that the district court abused its discretion in awarding attorneys' fees of $24,418.07 to Farmers for time spent on its interlocutory appeal of the denial of a motion for a preliminary injunction and its attempt to obtain an injunction at the appellate level. The State submits that Farmers' efforts at obtaining interlocutory relief did not in any manner advance the course of the litigation or contribute to the relief obtained by the final judgment.

Farmers filed the instant lawsuit challenging the constitutionality of both Sections 12A and 14, and seeking injunctive relief to prohibit their enforcement. The district court denied the motion for a preliminary injunction on the grounds that the harms were nearly equal and that Farmers had not demonstrated a likelihood of success on the merits.

Farmers appealed from the denial of its motion for a preliminary injunction and asked this court for an injunction pending appeal. This court denied the motion for an injunction

pending appeal. Farmers then asked the district court to stay proceedings in that court pending the outcome of the interlocutory appeal. Farmers asked for the stay because some of the legal issues on appeal from the denial of the preliminary injunction were also present in *NCRL*, which was pending in the Fourth Circuit, and that the interests of judicial economy would be served by awaiting this court's decision rather than going back to the district court.

The State argues that the district court should not have awarded attorneys' fees to Farmers for work done pursuing its interlocutory appeal because the appeal was fruitless. Specifically, the State notes that, in *NCRL*, the Fourth Circuit stayed, pending appeal, the district court's order finding Section 14 unconstitutional. The State argues that, given this ruling by the Fourth Circuit, Farmers' attempt to appeal the denial of a preliminary injunction in this case was doomed to fail. According to the State, the Fourth Circuit was not about to allow continued enforcement of Section 12A pending appeal in *NCRL* yet enjoin the enforcement of the same statute in this case.

In response, Farmers notes a number of reasons why it was reasonable to pursue its appeal of the denial of the preliminary injunction despite this court's ruling in *NCRL*. First, Farmers notes that a determination to stay a judgment pending appeal in one case depends on the unique circumstances in that case and has no bearing on other cases in which the parties and circumstances are different. A stay pending appeal thus "contemplate[s] individualized judgments in each case, the

formula cannot be reduced to a set of rigid rules." *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987). The stay in *NCRL* therefore did not mean that this court would not overturn the denial of the preliminary injunction in this case.

Second, Farmers notes that in *NCRL*, the State's lead argument for a stay pending appeal was that the plaintiffs in that case lacked Article III standing. In the instant case, standing has never been a serious issue. Farmers thus could have reasonably believed that the court was considering the merits of a stay of the statute for the first time when Farmers pursued its appeal of the denial of the preliminary injunction.

Finally, Farmers argues that its appeal was reasonable because this case involves different statutes than those involved in *NCRL*. Both cases involved a challenge to Section 14; however, *NCRL* also involved a challenge to § 163-278.13B, a regulation on lobbyist contributions, which was not at issue in this case. Further, Farmers challenged Section 12A, the statute at issue in this appeal, while that statute was not challenged in *NCRL*. Because the statutes involved in the cases were not identical, Farmers argues it had a reasonable basis for pursuing its appeal of the denial of the preliminary injunction.

The district court did not abuse its discretion in awarding Farmers attorneys' fees for its work on the interlocutory appeal. As the State concedes, Farmers was a prevailing party in this litigation. Although it did not prevail on its interlocutory appeal, it was ultimately successful in having the State enjoined from applying both Section 12A and Section 14. The State's

efforts to characterize Farmers' efforts as "wholly futile" based upon the stay entered in *NCRL* is unavailing. The State seems to suggest that this court's stay Order in *NCRL* essentially made it impossible for Farmers to prevail on its interlocutory appeal. The court agrees with Farmers' assessment of the deficiencies of the State's argument to this effect and agrees that pursuit of the interlocutory appeal was not a futile endeavor.

Furthermore, the court finds unconvincing the State's argument that because Farmers did not prevail in its interlocutory appeal, it was not entitled to its fees for pursuing it. As the Fourth Circuit has noted, "entitlement to fees for one aspect of a protracted litigation does not turn narrowly on whether the party prevailed on that particular matter, but whether a separate claim or, as here, a separate proceeding is so unrelated as to justify treating it as a 'separate lawsuit[ ].'" *Plyler v. Evatt*, 902 F.2d 273, 280 (4th Cir. 1990) ("*Plyler II*"). The district court found that Farmers' pursuit of interlocutory relief was related to the case in chief, and that, therefore, Farmers was entitled to its attorneys' fees for this work. Its decision in this regard was not an abuse of discretion.

V.

Finally, Farmers argues that the district court erred in denying certain attorneys' fees requested in responding to the State's motion for reconsideration on the question of mootness. Defendants argue that the district court's denial of the fees was proper. The parties disagree as to the standard of review applicable to this challenge.

"If the district court denies a prevailing party's motion for attorneys' fees, we review such denial for abuse of discretion. However, if the district court determines, as a matter of law, that a party is not a prevailing party, we review the district court's determination denovo." *Reinbold v. Evers*, 187 F.3d 348, 362 (4th Cir. 1999) (citations omitted); *see also Shaw v. Hunt*, 154 F.3d 161, 164 (4th Cir. 1998); *McDonnell v. Miller Oil Co.*, 134 F.3d 638, 640 (4th Cir. 1998).

In arguing that the district court ruled as a matter of law that they were not entitled to prevailing party status, plaintiffs apparently hang their hat on certain language found in the district court's order of July 27, 1999, which reads:

> Plaintiffs have submitted a request for fees and expenses for 40.75 hours of work done in relation to a motion to reconsider and in response to defendants [sic] objections to their original fee declaration. Defendants object to an award of fees and expenses for this time on the ground that the motion to reconsider to which plaintiffs responded was not addressed to the issue on which they prevailed. Specifically, defendants moved this court to reconsider its Order of 8 March 1999 only as to its decision that the unconstitutionality of N.C. Gen. Stat. § 163-278.12 was moot. Defendants did not move for reconsideration on the merits of the initial ruling. Plaintiffs agreed with defendants that the issue was not moot. However, they did

> not limit their response to the parameters of the motion, instead taking the opportunity to rebrief the merits as to that statute. The court denied the motion to reconsider by Order filed 9 June 1999 and did not reach the merits as both sides requested. ***Thus, neither side prevailed and each should bear its own costs.***

J.A. 313 (emphasis added). Plaintiffs' reliance on this language to support their position that the district court had found that it was not a prevailing party, and thus, requiring *de novo* review on appeal, ignores the indisputable finding of the court that plaintiffs were in fact prevailing parties. *See, e.g.*, J.A. 307 ("[T]he plaintiffs, as the prevailing party, are entitled to 'a reasonable attorney's fee as part of costs' at the discretion of the court."). It is obvious that the district court did not, as a matter of law, determine that plaintiffs were not a prevailing party. Therefore, we will review the district court's decision for an abuse of discretion.

As the parties are aware, a prevailing party is not necessarily entitled to all attorneys' fees requested, but rather, only those which the district court finds to be "reasonable." *See* 42 U.S.C. § 1988; *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). "Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. . . ." *Id.* at 434. A district court has discretion in determining the amount of a fee award. *See id.* at 437.

The district court did not abuse its discretion in determining that Farmers was not entitled to attorneys' fees for their response to the motion to reconsider. The State limited the scope of its motion to reconsider to the issue of the district court's determination that the constitutionality of Section 12A was moot.[4] There is no dispute that plaintiffs agreed with defendants on this point. However, in responding to the motion, plaintiffs spent little time in arguing on the question of mootness, but rather seized the opportunity to reargue the merits of the constitutionality of Section 12A, an issue that had already been extensively briefed for the court. When the district court denied the motion for reconsideration, it pointed out that the parties were in agreement on the issue of mootness. Therefore, because the motion was denied, the court determined that neither side had prevailed on this issue. It is obvious that the district court considered the hours expended on the response to the motion for reconsideration to be unnecessary. The district court noted that Farmers spent little, if any, time briefing the issue of mootness, which was the subject of the motion for reconsideration. The district court, in its discretion, decided that the state should not bear the expenses associated with plaintiffs' opportunistic briefing of issues not addressed by the motion to reconsider. Farmers argues that this court's holdings in *Plyler II* and *Arvinger v. Mayor & City Council of Baltimore*, 31 F.3d

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[4] Although Farmers argues that the State reargued the constitutionality of Section 12A in its motion to reconsider, the State simply referred the court to its earlier briefs on this issue. Farmers contends that this action required a response on the issue of the constitutionality of the statute. However, Farmers could simply have followed the state's lead and referred the district court to its earlier briefing on the subject.

196 (4th Cir. 1994), illustrate the error of the district court's holding. However, *Plyler II* and *Arvinger* are inapposite. *Plyler II* and *Arvinger* were concerned with whether a litigant's status as a prevailing party carries over to subsequent litigation efforts. As discussed above, there is no question that Farmers' status as the prevailing party carried over to the motion for reconsideration. The issue in the instant case is not whether Farmers was entitled to prevailing party status, but rather, as the prevailing party whether it was entitled to its fees in pursuing the motion to reconsider. The district court, in its discretion, found that they were not and this court finds no error in its ruling.

VI.

In conclusion, we hold that the constitutionality of Section 12A was not mooted by our holding in *NCRL* and the district court erred in so finding. We find the statute to be unconstitutionally overbroad and the state is enjoined from its enforcement. We affirm the district court's rulings on the attorneys' fees issues that are the subject of the appeal and the cross-appeal.

AFFIRMED

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ORDER AMENDING OPINION, 231 F.3D 155 (4TH CIR. 2000)

Filed: November 20, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Nos. 99-1955(L)
(CA-98-43-2-BR)

William Bryant Perry, et al.,

Plaintiffs - Appellees,

versus

Gary O. Bartlett, etc., et al.,

Defendants - Appellants.

ORDER

The court amends its opinion filed October 3, 2000, as follows:

On page 12, first paragraph, line 7 -- the reference to Section 14A is corrected to read "Section 12A."

For the Court - By Direction
/s/ Patricia S. Connor
Clerk

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OPINION, 1999 U.S. DIST. LEXIS 5881 (E.D.N.C., 1999)

Decided: March 8, 1999
Filed: March 8, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:98-CV-43-BR(2)

WILLIAM BRYANT PERRY and FARMERS for FAIRNESS, INC.,

Plaintiffs,

v.

GARY O. BARTLETT, in his official capacity as Executive Director of the State Board of Elections of the State of North Carolina, et al.,

Defendants.

ORDER

Farmers for Fairness, Inc. ("Farmers Inc.") and William Bryant Perry have asked this Court for declaratory and injunctive relief declaring N.C. Gen. Stat. § § 163-278.6(14) and 163-278.12A facially unconstitutional and enjoining enforcement of those statutes against Farmers, Inc. The court heard arguments from all parties at a hearing on 29 January 1999. Both sides have briefed these issues and request summary judgment. The matter is ripe for decision.

I. BACKGROUND

This case arises from a complaint filed with the North Carolina Board of Elections ("the Board") by Cynthia Watson, a Republican member of the State House of Representatives. In that complaint, Watson alleged that Farmers Inc. had targeted her for defeat in a recent primary by airing television and radio advertisements critical of her performance in office and by conducting "push polling," whereby likely Republican primary voters were told unflattering information about Watson. Watson was defeated in the primary.

After a hearing on the complaint, the Board issued its 23 June 1998 Order. In that Order, the Board determined that Farmers Inc., while originally organized for the purpose of promoting the interests of the corporate hog production industry in North Carolina, "became a political committee under N.C. Gen. Stat. § 163-278.6(14)." Farmers Inc. was thus ordered to comply with the reporting requirements and contribution limitations contained in the North Carolina campaign finance laws. Plaintiffs were specifically found to fall within the terms of § 163-278.6(14), which defines "political committee" for purposes of registration and reporting requirements in North Carolina, and to have violated § 163-278.12A, which imposes certain reporting requirements on any entity that makes expenditures on printed or broadcast materials which name potential candidates or candidates. The challenged statutes read as follows:

> § 163-278.6(14)
> The term "political committee" means a combination of two or more individuals, or any person, committee, association, or organization, the primary or incidental

purpose of which is to support or oppose any candidate or political party or to influence or attempt to influence the results of an election or which accepts contributions or makes expenditures to satisfy obligations of an election already held. The term includes, without limitation, any political party's State, county or district executive committee.

§ 163-278.12A
(a) General Duty to Report. - Any individual, person, political committee, or other entity that makes an expenditure for printed material or advertisements broadcast or distributed to anyone other than members of the entity shall report those expenditures in accordance with subsection (b) of this section if the printed material or advertisement names a candidate or names an individual whose prospective or potential candidacy is the principal purpose of a political committee.

Plaintiffs claim that § 163-278.6(14) and § 163-278.12A are overbroad because on their face they include groups which engage in "issue advocacy," which was deemed to be constitutionally protected from regulation in *Buckley v. Valeo*, 424 U.S. 1, [46 L. Ed. 2d 659, 96 S. Ct. 612] (1976). Plaintiffs claim this language "violates the First and Fourteenth Amendments to the United States Constitution by abridging protected political speech." (Plaintiffs' Mot. for Summ. J. ¶ 4.) Plaintiffs rely on *Virginia Society for Human Life, Inc.* (*"VSHL"*) *v. Caldwell*, 152 F.3d 268 (4th Cir. 1998), to claim that this Court cannot narrowly interpret N.C. Gen. Stat. § 163-278.6(14) or § 163- 278.12A because the language of the statutes is not readily susceptible to such construction. Plaintiffs' claim that "[b]ecause a narrowing construction is not readily apparent, the court's construction

would be unauthoritative, leaving Farmers' speech chilled." (Plaintiffs' Mot. for Summ. J. ¶ 17.) Plaintiffs also claim that collateral estoppel precludes relitigation of §163-278.6(14)'s constitutionality because in *North Carolina Right to Life, Inc. ("NCRL") v. Bartlett*, 3 F. Supp.2d 675 (E.D.N.C. 1998), Judge Boyle held that § 163-278.6(14) was facially unconstitutional. (Plaintiffs' Mot. for Summ. J. ¶ 20.)

Defendants claim that a narrow construction of § 163-278.6(14) and § 163-278.12A is reasonable and readily apparent and should be applied by this court. Defendants reason that under the North Carolina courts' rules of statutory interpretation, if two interpretations of a statute are available, only one of which is constitutional, "the interpretation finding the statute constitutional will be adopted." (Defendants' Resp. to Plaintiffs' Mot. for Summ. J. ¶ 5.) Defendants also contend that they should not be estopped in this case by Judge Boyle's decision in *NCRL*. Defendants assert that the United States Supreme Court has indicated that trial courts should have broad discretion to determine the applicability of offensive collateral estoppel. Accordingly, since neither the interest of judicial economy nor fairness will be served, offensive collateral estoppel should not be applied in this case.

For the reasons set forth below, plaintiffs' motion for summary judgment will be granted and defendants' motion for summary judgment will be denied.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate where there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Both plaintiffs and defendants agree that this case only

involves issues of law summary judgment is appropriate. (Plaintiffs' Mem. in Supp. of Mot. for Summ. J. at 1-2; Defendants' Resp. to Plaintiffs' Mot. for Summ. J. at 1-2.)

III. DISCUSSION

A. N.C. Gen Stat. § 163-278.6(14) is unconstitutionally vague and overbroad.

In *NCRL v. Bartlett*, [168 F.3d 705,] 1999 WL 74739 (4th Cir.), the Fourth Circuit specifically addressed the issue of whether § 163-278.6(14)'s definition of "political committee" was unconstitutionally vague and overbroad on its face. In that case, North Carolina Right to Life, Inc. (NCRL), a nonprofit corporation intending to engage in issue advocacy regarding abortion and euthanasia, brought suit in federal district court challenging several provisions of North Carolina's election law.[1] NCRL specifically challenged N.C. Gen Stat. § 163-278.6(14)'s definition of "political committee" on grounds that it included entities that engage solely in issue advocacy.[2] *Id.* at *2.

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[1] North Carolina Right to Life Political Action Committee, NCRL.'s organization created to engage in express advocacy, and Barbara Holt, NCRL's president, were also plaintiffs in this suit.

[2] NCRL also challenged three other provisions of North Carolina's election law: (1) the provision banning politically motivated corporate expenditures; (2) the provision prohibiting political committees and the lobbyists they employ from contributing to members and candidates while the General Assembly is in session; and (3) the provision prohibiting members and candidates for the General Assembly and Council of State from soliciting contributions from political committees and the lobbyists they employ.

As in the case at hand, plaintiffs in *NCRL* sought declaratory and injunctive relief. The district court held that the provision defining political committees was unconstitutional because it included entities that engage in issue advocacy. *NCRL*, 3 F. Supp. 2d at 679-80. The State appealed the district court decision regarding § 163-278.6(14)'s constitutionality, and the Fourth Circuit affirmed.

After concluding that NCRL had standing to challenge North Carolina's election law, the Fourth Circuit addressed the merits of NCRL's claims. See *NCRL*, 1999 WL 74739 at *5. The court discerned that due to the registration, recording, and reporting requirements, the consequences of finding NCRL to be a political committee were substantial. *Id.* In addition, the court concluded that § 163-278.6(14)'s definition included entities engaging solely in issue advocacy. *Id.* Accordingly, the court held that the statute unacceptably burdened important political speech and therefore was unconstitutionally overbroad. *Id.* at *6.

The Fourth Circuit rejected the State's argument that N.C. Gen Stat. § 163-278.6(14) should be narrowly construed, similar to the construction used by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1[63, 46 L. Ed. 2d 659, 96 S. Ct. 612] (1976). In *Buckley*, the Supreme Court held that a similar definition of political committee used in the Federal Election Campaign Act would be unconstitutional if it was not narrowly construed because it "could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. To avoid this result, the Court interpreted FECA's definition of political committee to include only those organizations whose major purpose is to engage in express advocacy by using specific words such as "vote for," "elect," "support," "vote against," "defeat," or "reject." *Id.* at 44 n. 52.

In *NCRL*, the Fourth Circuit concluded that N.C. Gen. Stat. § 163-278.6(14)'s definition of political committee could not be similarly construed due to "[t]wo crucial differences exist[ing] between § 163-278.6(14) and the provisions of FECA at issue in *Buckley*." *NCRL*, 1999 WL 74739 at *6. First, because the North Carolina definition of political committee included "groups that only incidentally engage in express advocacy," it was much broader than the definition at issue in *Buckley*. *Id.* The Fourth Circuit concluded that it would be required "to excise the word 'incidental' from the statute" in order to construct North Carolina's definition of political committee to be constitutional. *Id.*

According to the Fourth Circuit, the second distinction between the statute at issue in *Buckley* and N.C. Gen. Stat. § 163-278.6(14) is that "the North Carolina definition of political committee covers groups engaging in issue advocacy by explicitly juxtaposing express and issue advocacy, and thereby indicating that it encompasses both." *Id.* Since the statute includes any group the "'primary or incidental purpose of which is to support or oppose any candidate . . . *or* to influence or attempt to influence the result of an election'" the only reasonable interpretation of § 163-278.6(14) is that it includes both express and issue advocacy. *Id.* Consequently, the Fourth Circuit held that "without the benefit of a narrowing construction, section 163-278.6(14) is unconstitutionally vague and overbroad." *Id.*

As to § 163-278.6(14), Farmers Inc.'s claim is identical to that of NCRL. This court is bound by the decision of the Fourth Circuit finding this section to be facially unconstitutional. Summary judgment will be granted to

plaintiffs and an injunction will be entered permanently enjoining the enforcement of § 163-278.6(14).

B.§ 163-278.12A

Plaintiffs also seek to have this court declare § 163-278.12A unconstitutional on its face. In its 23 June 1998 order, the Board found that Farmers Inc. was a political committee under § 163-278.6(14) and was thus subject to the reporting requirements of § 163-278.12A. Pursuant to the Fourth Circuit's decision in *NCRL*, the Board has been enjoined from applying § 163-278.6(14). Absent that section, the Board's basis for finding that Farmers Inc. was subject to those reporting requirements no longer exists. The Board thus, on the facts of this case, has no authority to enforce § 163-278.12A against Farmers Inc. Therefore, the issue of the constitutionality of that section is moot and need not be reached in this order.

C. Attorney's Fees

Plaintiffs have requested attorney's fees and costs pursuant to 42 U.S.C. § 1988. 42 U.S.C. § 1988 provides that "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs." 42 U.S.C. § 1988. This case arises under 42 U.S.C. § 1983 and is a suit to enforce First Amendment rights. Therefore, plaintiffs are entitled to reasonable attorney's fees and costs of this action.

IV. CONCLUSION

For the reasons set forth above, plaintiffs' motion for summary judgment is GRANTED, and defendants' motion for summary judgment is DENIED. The Fourth Circuit having previously held N.C. Gen. Stat. § 163-278.6(14) to be unconstitutional, and there being no valid basis on which the Board may enforce N.C. Gen. Stat. § 163-278.12A against plaintiffs, the State of North Carolina is hereby ENJOINED from enforcing either section against plaintiffs.

It is hereby ORDERED, ADJUDGED AND DECREED that plaintiffs have and recover attorney's fees and expenses in a sum to be determined by subsequent order. Counsel is DIRECTED to provide to the court affidavits and billing records detailing counsel fees, investigative expenses and adjustment expenses, including tasks undertaken, individuals performing the task, time per task and hourly rates for services rendered in connection with this action. Plaintiffs must provide these affidavits within ten days of the date of this order. Defendants will then have ten days to respond or contest the reasonableness of plaintiffs' fees.

This 8 March 1999.

/s/ W. EARL BRITT
Senior United States District Judge

[Caption Omitted in Printing]

Judgment in a Civil Case

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, ". . . For the reasons set forth..., plaintiff's motion for summary judgment is GRANTED, and defendants' motion for summary judgment is DENIED. The Fourth Circuit having previously held N. C. Gen. Stat. Section 163-278.6(14) to be unconstitutional, and there being no valid basis on which the Board may enforce N. C. Gen. Stat. Section 163-278.12A against plaintiffs, the State of North Carolina is hereby ENJOINED from enforcing either section against plaintiffs.

It is hereby ORDERED, ADJUDGED, and DECREED that plaintiffs have and recover attorney's fees and expenses in a sum to be determined by subsequent order..."

[Judge Britt order of 3-8-99]

THE ABOVE JUDGMENT WAS FILED AND ENTERED TODAY, 8 MARCH 1999 AND A COPY MAILED TO:

Attorney Joseph B. Cheshire, V
Attorney John Keating Wiles
Attorney Susan Kelly Nichols
Attorney James Peeler Smith
Attorney Alexander McClure Peters
Attorney Steven R. Edelstein
Attorney General Michael F. Easley

March 8, 1999
Date
Raleigh, North Carolina

ORDER AND JUDGMENT, UNPUBLISHED

Decided: June 8, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:98-CV-43-BR(2)

WILLIAM BRYANT PERRY and FARMERS for FAIRNESS, INC.,

Plaintiffs,

v.

GARY O. BARTLETT, in his official capacity as Executive Director of the State Board of Elections of the State of North Carolina, et al.,

Defendants.

ORDER

THIS MATTER is before the court on the following post-trial matters: (1) defendants' motion to reconsider and modify order and judgment of March 8, 1999; and (2) plaintiffs' submission of an affidavit detailing plaintiffs'' attorney's fees and costs as ordered by this court's 8 March 1999 Order. The court will address each motion in the order enumerated above.

I. Defendants' Motion to Reconsider and Modify Judgment

This court held in its 8 March 1999 motion that N.C. Gen. Stat. § 163-278.6(14) was facially unconstitutional in that it infringed upon political speech protected by the First Amendment to the United State Constitution. The court relied upon the decision of the United States Court of Appeals for the Fourth Circuit in *North Carolina Right to Life ("NCRL") v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), which held that that statue was not subject to a readily apparent narrowing construction and was thus unconstitutional.

Following that holding, this court enjoined the North Carolina Board of Elections ("the Board") from enforcing § 163-278.6(14) against plaintiffs. The court held further that, since the Board had invoked § 163-278.6(14) to define Farmer's for Fairness, Inc. as a political committee and thereby require the organization to comply with the terms of § 163-278.12A, the injunction against the enforcement of § 163-278.6(14) mooted the question of the constitutionality of § 163-278.12A. There was, in short, no further basis to apply § 163-278.12A to defendants.

Defendants now ask this court to reconsider, under Federal Rule of Civil Procedure 59(e); its decision that the challenge to § 163-278/12A is moot on the facts of this case. Defendants argue that this court misunderstood their argument on the application of § 163-278.12A to plaintiffs. While plaintiffs cannot be considered a political committee, defendants assert, they still must comply with § 163-278..12A as an "other entity." Thus, according to defendants, the question of the constitutionality of the section shelled still be before the court. Plaintiffs have agreed with this

logic, but, of course, differ with defendants on the ultimate outcome of the inquiry. (Resp. to Mot. to Reconsider at 1.)

Whether a Rule 59(e) motion should be granted is within the discretion of the trial court. *Pacific Ins. co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396, 402 (4th Cir.1998). This court understands the arguments of the parties. The defendants' position on this motion was considered and rejected by the court in reaching its initial conclusion. The court sees no need to revisit the issue and no need for correction of the 8 March 1999 order. The motion to reconsider will be denied.

II. Plaintiffs' Affidavit of Attorney's Fees and Costs

This being an action brought under 42 U.S.C. § 1983, plaintiffs, as the prevailing party, are entitled, at this court's discretion, to "a reasonable attorney's fee as part of costs." 42 U.S. C. § 1988.

Plaintiffs have submitted the affidavit of John Keating Wiles, an attorney with the Raleigh firm of Cheshire, Parker, Schneider Wells, & Bryan, to document the expenses incurred in the prosecution of this matter. No response as to the reasonableness of those fees has been received from the State, and no further affidavits of fees have been received from plaintiffs. Therefore, this court will consider the reasonableness only of those fees reflected in the Wiles Affidavit.

In assessing the reasonableness of attorney's fees, this court is guided by the factors first articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5thCir. 1974) and later endorsed by the Court of Appeals for the Fourth Circuit. *See Trimper v. City of Norfolk*, 53 F.3d 68 (4th Cir.) *Cert. denied*, 516 U.S. 997 (1995), *citing, Daly v. Hill*, 790 F.2d 1071 (4th Cir. 1986). These factors are:

> (1) the time and labor required to litigate the suit; (2) the novelty and difficulty of the questions presented by the lawsuit; (3) the skill required properly to perform the legal service; (4) the preclusion of other employment opportunities for the attorney due to the attorney's acceptance of the case; (5) the customary fee for such services; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount in controversy involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10 the "undesirability" of the case; (11) the nature and length of the attorney's professional relationship with the client; and (12) awards in similar cases.

Trimper, 58 F.3d at 73. The *Johnson* approach to fee calculation begins with a determination of a base amount known as the "lodestar" which is arrived at by multiplying the number of hours reasonably expended by a reasonable hourly rate and then adjusted upward or downward based on the factors listed above. As the Eleventh Circuit has noted:

> First, the court must ascertain the nature and extent of the services supplied by the attorney. If the court finds the number of hours excessive, it should identify the hours disallowed and explain why it is disallowing them . . . . Secondly, the court must determine the value of the services rendered according to the customary charges in the area and the quality of the work produced. Special experience or expertise, or the lack of it, will be reflected in the hourly rate

> allowed. When the court has finished these two steps and arrived at a nominal fee, it should then consider the remaining *Johnson* factors appropriate to the particular case and briefly articulate how each of these factors affect the final compensation.

Fitzpatrick v. Internal Revenue Service, 665 F.2d 327, 332 (11th Cir. 1982) (citation omitted).

In calculating the lodestar, a court should include all time which it deems reasonable to have devoted to the case, provided that such time is properly documented. *See Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 543 F. Supp. 126 (E.D. Va. 1982). Counsel for plaintiff submitted to the court a detailed statement of the amount of hours worked by both wiles and Joseph Blount Cheshire V and the rate billed for such work for June 1998 through March 1999.

The Wiles Affidavit indicates that, together, he and Cheshire spent a total of 128.7 hours on the representation of plaintiffs in this matter. One of those hours, on 13 August 1998, was billed as a NO CHARGE. The court is personally aware of the complicated nature of the constitutional issues in involved in this case and appreciated the high quality of argument by both parties on brief and in oral arguments.

With few exceptions, noted below, the court finds the total number of hours expended by Wiles and Cheshire on this case to be reasonable. The court notes, however, that the bulk of oral argument for plaintiffs was conducted by James Bopp, Jr. The Wiles Affidavit indicates that a great deal of consultation occurred between Cheshire, Wiles and Bopp during the prosecution of this action. The court also accepts the statement

in the Wiles Affidavit that his client has received excellent legal services by the representation of Bopp. (Wiles Aff. at 2.) However, Bopp, has submitted no statement of fees and his time will therefore not be addressed.

In evaluating whether or not to allow recovery of attorney's fees for certain activities, this court will adopt the test set forth in *Greenside v. Aravoshi*, 526 F. Supp. 1194 (D. Haw. 1981):

> The test for compensation is whether a given step was necessary to attain the relief afforded. If the maneuver was required by the adjudicatory process, then the hours spent handling that step should be fully compensable, but if it was irrelevant tot he ultimate judgment, the party must pay for it himself.

Id. at 1197.

A review of the billing statement provided as Exhibit A shows 2.25 hours billed for drafting of a letter to the editor by Wiles on 22 February 1999 and .20 hours billed for a review of that letter by Cheshire. The court finds the time spent on the letter to the editor not to be sufficiently related tot he ultimate outcome of the case at bar as to be compensable under 42 U.S. C. § 1988.

Exhibit A also shows 1.75 hours spent by Wiles in telephone conversation with N. Weaver and reporters on 9 March 1999. That time is also irrelevant to the outcome of this matter and will not be considered. The exhibit also shows an hour on 10 March 1999 billed by Cheshire, which includes time reviewing an editorial, and telephone conversations with media. The court will reduce this hour by one half and allow plaintiffs to be compensated for the time Cheshire indicates he spent reviewing

this court's 8 March 1999 order. Likewise, the .3 hours on 16 March 1999 during which Exhibit A indicates Cheshire had a conversation with Chief United States District Judge Terrence Boyle regarding an order and reviewed editorials in the News & Observer will also be stricken as unrelated to the outcome of this case.

In addition, Exhibit A indicates 4. 75 hours billed by Wiles on 6 July 1998 for "[t]ravel to and from Greenville, NC to hand deliver pleading to Judge Boyle; telephone calls with Willard, C. Wrenn and L. Coe." The court does not find it necessary to the outcome of the action for counsel to have billed at his full hourly rate for services for which the expertise of an attorney were not required, such as delivery of documents. This time will therefore not be considered by the court in calculating the lodestar amount.

The Exhibit also indicates .5 hours billed by a JM on 24 June 1998. No explanation is given as to the identity of JM or his qualifications. Therefore this half hour will not be considered in calculating the lodestar amount.

These minor subtractions leave the plaintiff claiming 87.45 hours billed by Wiles. The court finds this total to be reasonable in light of the complexity and duration of this case. The exhibit, after the deductions noted above, shows a total of 30 hours billed by Cheshire. This total is also accepted by the court as reasonable.

As to the hourly rates charged by counsel, the court is likewise comfortable with their reasonableness. The Wiles affidavit indicates that his time was billed at an hourly rate of $150. Wiles was admitted to the Bar of North Carolina in 1995. That rate is consistent with rates for attorneys of similar experience

with similarly sized firms in Raleigh as reflected in the 1998 North Carolina Bar Association Economic Survey ("Bar Survey"), which was $122-124 in 1997. *See* Bar Survey at 22.

Likewise, Cheshire's indicated hourly rate of $250 per hour is at the top of the range, but is still consistent with the rates reflected in the Bar Survey for attorneys admitted to the bar before 1976 practicing in a city the size of Raleigh. This amount as between $191 and $214 in 1997. *See* Bar Survey at 24.

While the Wiles affidavit does indicate that both Wiles and Cheshire specialize in criminal law, and not First Amendment law, the court is satisfied that counsel did not expend excessive time learning the issues involved. The court accepts Wiles' statements in his affidavit that the bulk of the familiarization process occurred during their representation of plaintiffs before the North Carolina Board of Elections, during which time counsel successfully avoided criminal referrals from the Board. The hourly rates billed by counsel are thus accepted by the court as reasonable.

In light of the above, the lodestar calculation for the fees to be awarded is as follows:

John Keating Wiles 87.45 hours at $150 per hour $13,117.50

Joe B. Cheshire, V 30 hours at $250 per hour $7,500.00

TOTAL $20,617.50

Thus, with the total recited above reflecting the lodestar calculation, the court will now address the *Johnson* factors. The first is the difficulty of the questions presented int his lawsuit. The constitutional and electoral issues involved in this case are

complex and are matters of heated debate, not only in the courts but elsewhere in our political system. The attorneys in this matter produced thoroughly researched and documented briefs and addressed the complicated issues involved directly and clearly. This factor, therefore, weighs in favor of an award to plaintiff. The second factor is the skill required to perform the legal service. This also weighs in plaintiff's favor, as this case required familiarity both with the intricacies of North Carolina campaign finance law and of the landscape of litigation, including pretrial procedures and oral arguments on dispositive motions. A high level of skill was needed in order to perform the necessary legal work.

The third factor, the preclusion of other employment, is not invoked in this case, as nothing indicates Wiles and Cheshire ceased representing other clients during the pendency of this matter or were negatively affected in their ability to do so. The fourth factor, customary fee for such service, weighs in favor of plaintiff. As noted above, the court has determined that the rates charged by plaintiffs' counsel were somewhat high, but within the range of reasonable rates as indicated by the Bar Survey. The fifth factor addresses whether the fee was fixed or contingent. Plaintiffs' counsel indicate that they billed their client at and hourly rate and were compensated at that rate throughout the proceedings. Thus, counsel did not undertake a risk as to payment of fees. This factor weighs against plaintiff.

The sixth factor addresses time limitations imposed by the client or circumstances. Plaintiffs' counsel do not discuss any such limitations, and this matter stretched over several months. Further, the court is not aware of any unique time constraints at issue in this matter. The court, therefore, finds this factor to be neutral in effect on the award.

The seventh factor is related to the amount in controversy and the results obtained. It is clear from the record that plaintiffs succeeded on their major legal theories and obtained the injunctive relief they sought. Thus, the favorable results for plaintiffs weigh in favor of an award. There being no amount in controversy in this action, that factor does not affect the award.

The eighth factor is the experience, reputation and ability of the attorneys. All counsel involved in this matter, both for the plaintiffs and defendants, enjoy excellent reputations as attorneys. Additionally, as was evidence in the courtroom, all counsel had sufficient experience and ability to handle this challenging case. This factor weighs in favor of an award. The ninth factor, addressing the undesirability of the case, is neutral as to an award. There is nothing about the case that would make it undesirable.

The tenth factor concerns the nature and length fo the attorneys' professional relationship with the client. In this case, Farmers for Fairness, Inc. had a professional relationship with Cheshire, Parker, Schneider, Wells & Bryan extending at least to the firm's representation of Farmers Inc. before the Board of Elections prior to the instigation of this litigation. Thus, it appears such a relationship is significant and would favor an award. Finally, the last factor requires an examination of awards in similar cases. Upon review of other cases wherein fees were awarded pursuant to § 1988, as discussed above, the court finds that this factor supports an oward. *See Farrar v. Hobby*, 506 U.S. 103 (1992).

Upon on full examination of these factors and a calculation of the lodestar amount based upon the appropriately documented time and hourly rate, the court finds that plaintiffs are entitled to an award of attorney's fees in the amount of $20,617.50

Plaintiffs also allege that they are entitled to recover legitimate expenses pursuant to 42 U.S.C. § 1988. Prevailing parties in Civil Rights actions are entitled to recover those out-of-pocket expenses normally charged to a fee-paying client. *See Harris v. Marhoefer*, 24 F.3d 16 (9th Cir.1994). According to plaintiffs, these expenses total $1,605.57. In evaluating the reasonableness of these expenses, the court takes exception only to the mileage charged for the previously discussed hand delivery a document to Chief Judge Boyle. Exhibit A indicate and amount o f $51.84 for this expense. Subtracting that amount from the requested total, plaintiff shall recover $1,553.73 in expenses.

III. Conclusion

For the reasons stated above, defendants' motion for reconsideration or modification is DENIED. It is hereby ORDERED, ADJUDGED and DECREED that plaintiff shall have and recover from defendants $20,617.50 in attorney's fees and $153.73 in expenses for a total of $22,171.23

This 8 June 1999.

/s/ W. EARL BRITT
Senior United States District Judge

[Caption Omitted in Printing]

Judgment in a Civil Case

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that , defendants' motion for reconsideration or modification is DENIED. It is hereby ORDERED, ADJUDGED and DECREED that plaintiffs shall have and recover from defendants [Judge Britt order of 6-9-99]

THE ABOVE JUDGMENT WAS FILED AND ENTERED TODAY, 9 JUNE 1999 AND A COPY MAILED TO:

Attorney Joseph B. Cheshire, V
Attorney John Keating Wiles
Attorney Susan Kelly Nichols
Attorney James Peeler Smith
Attorney Alexander McClure Peters
Attorney Steven R. Edelstein
Attorney General Michael F. Easley

June 9, 1999
Raleigh, North Carolina

David W. Daniel, Clerk
(by) /s/ W. S. Cannon, Deputy Clerk

ORDER, UNREPORTED

Decided: June 23, 1998

BEFORE THE STATE BOARD OF ELECTIONS

North Carolina
Wake County

ORDER

In Re: *Complaints of Rep. Cynthia B. Watson and Steven Rader about Farmers for Fairness, Inc.*

THIS CAUSE came before the State Board of Elections at a hearing held April 2-4, 1998, upon the complaint of Rep. Cynthia B. Watson and the related letter filed by Steven Rader in which they alleged that Farmers for Fairness, Inc., was conducting campaign activity without filing as a political committee and without complying with contribution limits and reporting requirements under North Carolina's laws governing campaign financing. (*See* Article 22A, Chapter 163, N.C. General Statutes).

Rep. Watson appeared *pro se* at the hearing, Farmers for Fairness, Inc., was represented by Joseph B. Cheshire V and John Keating Wiles, and Mr. Rader did not appear at the hearing. The State Board, after reviewing the Complaint filed by Rep. Watson, subsequent correspondence from Ms. Watson and Mr. Rader, testimony and materials submitted to the Board

either before or during the evidentiary hearing, and public records on file with the Board or county elections officials, finds and concludes as follows:

1. Rep. Cynthia Watson is seeking reelection in House District 10 for a seat in the House of Representatives of the North Carolina General Assembly. She filed for office on January 22, 1998. Her opponent in the Republican primary held on May 5, 1998, was Johnnie D. Manning, who filed for office on February 2, 1998. The candidate who received the Democratic nomination for this House seat was Russell E. Tucker, who filed for office on January 5, 1998. House District 10 is comprised of part of Duplin County, part of Jones County and part of Onslow County. Rep. Watson was first elected to this seat in 1994 and won reelection in 1996. In 1994 Cynthia Watson won by receiving 64 more votes than did Vance Alphin, who was the Democratic nominee. In 1996 she defeated Russell Tucker by 205 votes.

2. Rep. Edwin M. "Sandy" Hardy is seeking reelection in House District 2. He filed for office on January 5, 1998. He had no opposition in the Republican primary but three candidates sought the Democratic nomination for this House seat. The three candidates were Robert B. Cayton, who filed his notice of candidacy on January 5, 1998, Zeno L. Edwards, Jr., who filed his notice of candidacy on January 2, 1998, and Daniel Mallison III, who filed his notice of candidacy on January 5, 1998. House District 2 is comprised of Beaufort County, Hyde County, part of Craven County and part of Pitt County. Rep. Hardy was elected to this seat in 1996 after

defeating Zeno Edwards in the Republican primary.

3. Rep. Bobby Ray Hall is seeking reelection in House District 19 to one of two seats in the House of Representatives of the North Carolina General Assembly. He filed for office on January 24, 1998, and the other person who sought nomination in the Republican primary was Don Davis, who filed his notice of candidacy on January 5, 1998. The candidates who sought the Democratic nomination for this seat are Leslie Cox, who filed his notice of candidacy on January 5, 1998, and H.L. Sorrell, Jr, who filed his notice of candidacy on January 23, 1998. House District 19 is comprised of Harnett and Lee Counties and part of Sampson County. Rep. Hall was elected to this seat in 1996 after defeating Leslie Cox by 72 votes.

4. Rep. Richard T. Morgan is seeking reelection in House District 31, and he filed his notice of candidacy on January 12, 1998. His opponent for the Republican nomination to this seat was Arthur M. "Art" Blue, who filed his notice of candidacy on February 2, 1998. Only one Democrat sought nomination to this seat; Ellen Vann Crews filed her notice of candidacy on February 2, 1998. House District 31 is comprised of part of Moore County.

5. Farmers for Fairness, Inc., filed Articles of Incorporation as a corporation organized under Chapter 55A of the General Statutes with the Secretary of State on June 13, 1996. The registered office of the organization is in Newton Grove, North Carolina, in Sampson County. Its membership is primarily comprised of corporations involved in the large-scale

production of hogs, with membership dues of those members apportioned based on the number of producing sows of a given entity. A few members became such by donating in-kind contributions to Farmers for Fairness, Inc., or making minimal contributions to the organization. In its first year of operation, Farmers for Fairness, Inc., raised $1,433,078 in membership dues. Since the end of the first fiscal year of operation on May 31, 1997, the Secretary/Treasurer of the corporation testified that it had raised approximately $700,000. Its sole source of income is membership dues and assessments. Originally, there were approximately 8 members but currently there are approximately two dozen corporate or individual members of Farmers for Fairness, Inc.

6. Farmers for Fairness, Inc., is managed through a Board of Directors. Nick Weaver has been the Chairman of the organization since its inception and Lu-Ann Coe has been its Secretary/Treasurer. Mr. Weaver represents Goldsboro Milling Co., a company with interests in hogs, on the Board of Directors of the corporation. Ms. Coe became the sole, full-time employee for the organization on January 1, 1998, and serves as its Executive Director. Before she became a full-time employee she was in charge of public and governmental relations at Hog Slats, Inc., an entity which builds hog houses. She has been a registered lobbyist for Farmers for Fairness, Inc. She also has served as Chairman of the political committee of the North Carolina Pork Council. A third active member of the Board of Directors is Lois Britt, Vice President for Public Affairs of Murphy Family Farms, the largest seller of hogs in North Carolina.

7. Farmers for Fairness, Inc., was organized for the purpose of promoting the interests of the hog industry to elected officials and the general public.

8. Senate Bill 1217 was adopted by the General Assembly during its 1996 Session based on the recommendations of a blue ribbon committee set up to address concerns about the environmental impact of animal wastes. Nick Weaver served on the blue ribbon committee. This legislation imposed new restrictions on hog farming and was of tremendous concern to Farmers for Fairness, Inc.

9. Louis Maxwell, Wendell Murphy and Nick Weaver consulted with Paul Shumaker after the adoption of S.B. 1217 on a strategy for addressing industry concerns.

10. Mr. Shumaker prepared a plan of action for a public relations campaign which he submitted on July 16, 1996. Paul Shumaker is an experienced, established political consultant to Republican candidates and party committees. He is the President of Capitol Communications, Inc.

11. At the direction of Farmers for Fairness, Inc., Mr. Shumaker began polling through a professional polling organization known as Public Opinion Strategies after the general election in November of 1996. A statewide poll was conducted by media markets in January 1997 in which a number of questions related to hog farming and environmental pollution were asked. No questions were asked about individual state legislators. The result of this "benchmark" poll

determined that the top target population for Farmers for Fairness, Inc., was the 39% of those polled who identified hog farming as "a somewhat significant environmental problem." Public Opinion Strategies concluded that these "voters tend to be soft GOPers, white conservative Dems, white mod/lib Dems, voters in Raleigh/the East, voters under age 55, and voters with some college education." Ex. 23, p. 5.

12. Paul Shumaker currently is a consultant to Rep. Harold Brubaker, Speaker of the North Carolina House of Representatives, and is retained by the North Carolina Republican House Committee, which is a multi-candidate political committee. He worked with Farmers for Fairness, Inc., intermittently until March, 1997, when he worked on a month-to-month basis until September of 1997. He made it clear to Farmers for Fairness, Inc., that he could not work for them if at any time they decided to start attacking Republican members of the North Carolina House of Representatives, because he viewed that as a conflict of interest with his other clients.

13. In March of 1997, Rep. Richard Morgan introduced legislation in the form of H.B. 515 that would impose a moratorium on future hog farm development. Mr. Shumaker and Carter Wrenn, another well-known Republican political consultant, were retained by Farmers for Fairness, Inc., in March 1997 to develop a public relations campaign focussed on dealing with this legislation.

14. The public relations effort Mr. Shumaker and Mr.

Wrenn recommended called for research, polling, and advertising through print and electronic media and direct mail. Farmers for Fairness, Inc., authorized research, polling and advertising according to this recommendation. The public relations effort continued through August of 1997. The essence of the plan was to refocus debate through paid media from "corporate hog farming" to "agriculture" and from "hogs" to "water." Ex. 23, p. 5; Ex. 24, p. 1.

15. Statewide polling in media markets was conducted on April 3, 1997, April 27, 1997, May 14, 1997, and June 30, 1997. Although these polls sought to identify the polled person's party affiliation and race and had "favorable/unfavorable" questions about officials elected statewide, they had no questions about individual state legislators.

16. Farmers for Fairness, Inc., ran a series of advertisements throughout the summer of 1997 on hog farming issues but none of the advertisements distributed to the public named legislators or potential candidates for the legislature. They prepared scripts, however, for three advertisements in which three state senators were named, and produced one television advertisement about one senator. These materials were never disseminated to the public.

17. The public relations and lobbying effort conducted through the summer of 1997 was not viewed by Farmers for Fairness, Inc., as successful in changing legislative opinion because H.B. 515 was passed during the 1997 Session of the

General Assembly, and a moratorium was imposed on expanded or new hog farms. T. pp. 116, 400.

18. Carter Wrenn had advised Farmers for Fairness, Inc., earlier in 1997 that they needed to get the General Assembly's attention and the way to do that is to beat one of them.

19. Mr. Wrenn recommended in October of 1997 that Farmers for Fairness, Inc., begin a second phase in their public relations effort, with issue advertising against legislators in certain legislative districts. He said he chose the districts using the following criteria:

> "Representative Watson was the most outspoken person in the Legislature criticizing the hog industry. Representative Morgan introduced the bill, and I think could be characterized as the second most critical. I would have called Bobby Ray Hall the third most critical, and his district was . . . contiguous, next to the hog growing area.
>
> Sandy Hardy was, I think, the Republican who got the lowest amount of vote in an election in 1996. Obviously if you are going to change public opinion, it will have more influence on a candidate or a representative in a swing district than somebody who is in a district where they get 80 percent of the vote because it is

Republican. So if you are mobilizing public opinion, someone like Hardy is more likely to feel the heat, if you will, to react to it."
T. pp. 117-118.

20. In the fall of 1997, Farmers for Fairness, Inc., also assessed the conflicts of interests of the lobbyists and consultants working with them. Mr. Shumaker had made it clear that he had a conflict of interest if advertisements began attacking Republicans. Mr. Shumaker was contacted by Mr. Weaver in September to talk about conflicts of interest, and Mr. Weaver indicated that the possibility of using advertisements attacking House Republicans was on the table. Mr. Shumaker did no more work for Farmers for Fairness, Inc., after early September.
T. pp. 257-62.

21. In October, Farmers for Fairness, Inc., initiated a more aggressive public relations campaign. The nature of both the polling and the advertising changed significantly, and began attacking individual candidates.

22. Between November and February, polls were conducted in the four legislative districts identified above. The polling changed from that which was conducted earlier in 1997 in that it began to ask a number of specific questions about incumbent legislators and potential candidates for the General Assembly in 1998. Many of these questions were "push questions" in that they attempted to present a fact about which the person polled may have been unaware in order to push the person polled

toward a new opinion. These polls were conducted by legislative district rather than by media market. The first question in the poll asked if the person being interviewed was a registered voter who intended to vote in the fall and the pollster was told to terminate the poll if the response was negative. The second question asked what the race of the person polled was, and if they answered anything other than white the poll was to be terminated. It is evident from the questions in the polls, that they were designed at the outset to influence the opinions of white Republican and Democratic voters concerning candidates.

23. Polls were conducted in House districts 2, 10, 19 and 31 and in Senate District 5 between November 11, 1997 and February 8, 1998. Rep. Watson's 10th District was polled in November and again between February 6 and 8. Each House District poll was of 300 registered voters, with the poll to be terminated if the person called indicated either that he not registered and intending to vote in the fall or that he was not white. All polls were conducted by the professional polling firm of John McLaughlin and Associates. Polling of this nature is expensive and Mr. Wrenn indicated that the polls cost as much as $15,000 each. Polls are so expensive to conduct that no questions are asked unless those taking the poll are interested in the information derived from asking. These polls were replete with election-related questions and with questions designed to present new information to the person being polled. Included in the polls were the following questions (**which have not been edited or corrected**):

From the November 11, 1997, polling of House District 10 and Senate District 5 (before candidates could file for office):

- **Would you vote to re-elect Cindy Watson to the North Carolina State Legislature, regardless of who ran against her?**

- **If the Republican primary election for North Carolina State House of Representative were held today, and the candidates were Cindy Watson and Emily Manning, for whom would you vote?**

- **Would you be more likely or less likely to vote for Cindy Watson for state legislature, if you knew it were true that she voted to raise her own pay as a state legislator?**

- **Would you be more likely or less likely to vote for Cindy Watson for state legislature, if you knew it were true that she took a junket to Hawaii at the expense of North Carolina taxpayers and missed a key vote in the legislature on the $11 billion state budget while she was in Hawaii?**

- Would you be more likely or less likely to vote for Cindy Watson for state legislature, if you knew that she voted against parental consent which requires a teenage girl to have her parents' consent before she can have an abortion?

From the February 6, 1998, polling of House District 10 (after the filing period closed):

- If the Republican primary election for North Carolina State House of Representative were held today, and the candidates were Cindy Watson and Johnny D. Manning, for whom would you vote?

- If the election for North Carolina State House of Representative were held today, and the candidates were Cindy Watson, the Republican, and Russell Tucker, the Democrat, for whom would you vote?

- Would you be more likely or less likely to vote for Cindy Watson for state legislature, if you knew it were true that she put her husband on the state payroll by having him work for her in her State

Legislature office?

- Would you be more likely or less likely to vote for Johnny D. Manning for state legislature, if you knew it were true that Johnny D. Manning raises hogs in affiliation with Wendell Murphy Family Farms?

- Johnny D. Manning has been a farmer all his life. When he started raising hogs he decided to work in affiliation with Wendell Murphy Family Farms because they provided modern technology, veterinary medicine and genetically better hogs and allowed him to limit his financial risk. Knowing this, would you be more likely or less likely to vote for Johnny D. Manning for state legislature?

From the January 28, 1998, poll conducted in House District 19 (during the filing period open):

- Would you be more likely or less likely to vote for Bobby Ray Hall for state legislature, if you knew it were true that Bobby Ray Hall voted twice to raise his own pay as State Legislator? If it would make no difference, just say so

- Would you be more likely or less likely

to vote for Bobby Ray Hall for state legislature, if you knew that even though Bobby Ray Hall knew that the people in his district were against increasing pensions for State Legislators, he voted to increase pensions for State Legislators by nearly 50%? If it would make no difference, just say so

From the November 13, 1997, poll conducted in House District 31 (before the filing period opened):

- Would you be more likely or less likely to vote for Richard Morgan for state legislature, if you knew that he sponsored legislation to make school board election's partisan without consulting local school board members?

- Would you be more likely or less likely to vote for Richard Morgan for state legislator if you knew that while owning a herd of cattle, Richard Morgan acquired $240,000 in taxpayer funds for the Westmoore AgriCivic Center t build a place to have cattle shows in Moore County?

From the January 28, 1998, poll conducted in House District 2 (during the filing period):

- If the election for North Carolina State House of Representatives were held today, and the candidates were Edwin M. "Sandy" Hardy, the Republican, and Zeno Edwards, the Democrat, for whom would you vote?

- Would you be more likely or less likely to vote for Edwin M. "Sandy" Hardy for state legislature, if you knew it were true that he voted for a budget that increased state spending three times faster than the rate of inflation that v included a pay raise for State Legislators?

- Would you be more likely or less likely to vote for Edwin M. "Sandy" Hardy for state legislature, if you knew that he voted to raise pensions for state legislators who become judges?

The intent of these polls was to learn the strengths and weaknesses of candidates, and to change the opinions of voters concerning Representatives Watson, Hall, Morgan, and Hardy and candidate Manning. Mr. Wrenn testified that "one of the simplest ways to change public opinion is to give people a fact

that they are unaware of."

24. Advertisements naming candidates were disseminated to the general public beginning on December 29, 1997. The cost of this advertising in Representative Watson's district alone was estimated by Mr. Wrenn to be $10,000 per week and by Mr. Shumaker to be even higher than that. The cost of production of one radio spot is approximately $1500 and of one television spot is $10,000 to $12,000.

25. Lu-Ann Coe told reporter Aaron Hoover of the *Wilmington Star-News* on or about January 19, 1998, that Rep. Watson's upcoming bid for re-election was a consideration in singling her out for the first advertisements that attacked legislators.

26. The *Wilmington Star-News,* in an article written by Aaron Hoover, reported on January 19, 1998, in an article that was entitled, "Hog lobby takes aim at Duplin legislator," that Farmers for Fairness, Inc., had launched its first broadcast attack on an individual lawmaker. Lu-Ann Coe was attributed in the article as follows: "Rep. Watson's upcoming bid for re-election was also a consideration, she [Ms. Coe] said." Ms. Coe provided the board with a copy of a letter to Aaron Hoover purportedly mailed on January 22, 1998, but never received by him, in which she took exception to the use of paraphrasing and denied making the statement. The reporter, who now lives out-of-state and is not subject to service of process, provided the Board with a sworn statement that he had never received the letter, that he had taken great care to quote people accurately,

and that the statement in the article was accurate. Ms. Coe continues to deny making the statement, but the Board does not find her denial credible in light of her failure, as spokesperson for Farmers for Fairness, Inc., on an issue of critical importance to the corporation and on which specific legal advice had been obtained, to demand a correction or retraction of the article either in the letter she wrote to Mr. Hoover or by telephone or any other type of contact with Mr. Hoover or anyone else at the *Wilmington-Star News.*

27. In October 1997 when Farmers for Fairness, Inc., entered the second stage of its public relations campaign it undertook activities that manifested its intent to oppose the reelection of vulnerable Republican candidates for the North Carolina House of Representatives. An ancillary purpose of these activities by Farmers for Fairness, Inc., was to affect the selection of the next Speaker of the North Carolina House of Representatives.

28. On the part of Lu-Ann Coe, Nick Weaver, Lois Britt, and any other officers of Farmers for Fairness, Inc., there was no criminal intent to violate the provisions of Chapter 163.

CONCLUSIONS

1. Farmers for Fairness, Inc., is subject to the requirements of N.C. Gen. Stat. § 163-278.12A which became effective on December 1, 1997.

2. There being no criminal intent on the part of any of the officers of Farmers for Fairness, Inc., the Board does not make a referral to a district attorney based on the findings set forth herein.

3. In October of 1997 Farmers for Fairness, Inc., became a political committee under N.C. Gen. Stat. § 163-278.6(14) because a primary purpose of the organization was to support or oppose one or more candidates and it made expenditures in order to support or oppose the nomination or election of one or more candidates.

It is, therefore, ORDERED that:

1. Farmers for Fairness, Inc., form a segregated fund under N.C. Gen. Stat. § 163-278.19(b) and that it make the necessary filings required under Chapter 163 for a political committee. Such filings will include the disclosure of all contributions and expenses since October 1, 1997. No corporate contributions may be made to the political committee's separate segregated fund except as allowed for reasonable administrative support. Any corporate contributions to Farmers for Fairness, Inc., made after it undertook the activities of a political committee must be returned to the donors to the extent the funds were not expended as of April 4, 1998. All contributions to the political committee after April 4, 1998, may only be from individuals or party committees and are subject to the $4,000 per primary or per election limitation set forth in N.C. Gen. Stat. § 163-278.13. Necessary filings must be made within 10 days of the date of this ORDER.

2. In addition, Farmers for Fairness, Inc., is subject to the provisions of N.C. Gen. Stat. § 163-278.12A which became effective December 1, 1997. Disclosure on the filings required because of its status as a political committee will satisfy the reports required by this provision.

This 23rd day of June, 1998.

Larry Leake, Chairman

Gary O. Bartlett,
Executive Secretary-Director
for the STATE BOARD OF ELECTIONS

Paragraph 2 of this Order, along with the supporting findings of fact and conclusions of law, was adopted unanimously. Paragraph 1 of this Order, along with the findings of fact and conclusions supporting it, was decided in a 4-1 vote.

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JUDGMENT OF COURT OF APPEALS

FILED
October 25, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1955
CA-98-43-2-BR

Perry v. Bartlet

No. 99-2127
CA-98-43-2-BR

Perry v. Bartlett

No. 99-2148
CA-98-43-2-BR

Perry v. Bartlett

MANDATE

The judgment of this Court dated 10/3/00 takes effect today.

PATRICIA S. CONNOR
CLERK

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United States Constitution, Amendment I

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

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N.C. GEN. STAT. § 163-278.12A (2000)

§ 163-278.12A. Disclosure of spending for material that names candidates

(a) General Duty to Report. -- Any individual, person, political committee, or other entity that makes an expenditure for printed material or advertisements broadcast or distributed to anyone other than members of the entity shall report those expenditures in accordance with subsection (b) of this section if the printed material or advertisement names a candidate or names an individual whose prospective or potential candidacy is the principal purpose of a political committee. The disclosure requirements of this section do not apply to the following:

(1) Material that is solely informational and is not intended to advocate the election or defeat of a candidate or prospective candidate; or

(2) The owner of a newspaper, magazine, radio outlet, or television outlet, if that owner is not a candidate, political committee, or the parent entity of a political committee under G.S. 163-278.19.

(b) Procedures for Reporting; Exceptions. -- Any political committee or other entity otherwise required by this Article to file reports with a board of elections shall include an expenditure described in subsection (a) of this section on those reports. Any entity not otherwise required by this Article to file reports shall report expenditures described in subsection (a) of this section to the State Board of Elections within 10 days after the aggregate expenditure has reached the lowest threshold amount set for candidates and political party committees in G.S. 163-278.10A. After the initial report, each entity shall report subsequent expenditures described in subsection (a) of this section according to the

schedule set out in G.S. 163-278.9(a) or Part 2 of this Article, whichever is appropriate.

(c) Definition. -- For the purpose of this section, notwithstanding G.S. 163-278.6(9), the term "expenditure" means any purchase, advance, conveyance, deposit, distribution, transfer of funds, loans, payment, gift, pledge, or subscription of money or anything of value whatsoever, whether or not made in an election year, and any contract, agreement, promise, or other obligation, whether or not legally enforceable. An individual or entity is deemed to have made an expenditure for printed material or advertisements if that individual or entity has agreed to compensate another individual or entity for purchasing such printed material or advertisements.

(d) No Criminal Liability. -- No duty imposed by this section alone, and by no other law, shall be relied upon or otherwise interpreted to create criminal liability for any person.

N.C. GEN. STAT. § 163-278-34 (2000)

§ 163-278.34. Filings; penalty for late filings

(a) Except as provided in G.S. 163-278.9, all reports, statements or other documents required by this Article to be filed with the Board shall be filed either by manual delivery to or by mail addressed to the Board. Timely filing shall be complete if postmarked on the day the reports, statements or other documents are to be delivered to the Board. If a report, statement or other document is not filed within the time required by this Article, then the individual, person, media, candidate, political committee, referendum committee or treasurer responsible for filing shall pay to the State Board of Elections election enforcement costs and a civil late penalty as follows:

(1) Two hundred fifty dollars ($250.00) per day for each day the filing is late for a report that affects statewide elections, not to exceed a total of ten thousand dollars ($10,000); and

(2) Fifty dollars ($50.00) per day for each day the filing is late for a report that affects only nonstatewide elections, not to exceed a total of five hundred dollars ($500.00).

The State Board shall immediately notify, or cause to be notified, late filers, from which reports are apparently due, by registered or certified mail, return receipt requested, of the penalties under this section.

(a1) The State Board shall calculate and assess the amount of the civil penalty due under subsection (a) of this section and shall notify the person who is assessed the civil

penalty of the amount. The notice of assessment shall be served by any means authorized under G.S. 1A-1, Rule 4, and shall direct the violator either to pay the assessment or to contest the assessment within 30 days by filing a petition for a contested case under Article 3 of Chapter 150B of the General Statutes. If a violator does not pay a civil penalty assessed by the Board within 30 days after it is due, the Board shall request the Attorney General to institute a civil action to recover the amount of the assessment. The civil action may be brought in the superior court of any county where the report was due to be filed or any county where the violator resides or maintains an office. A civil action must be filed within three years of the date the assessment was due. An assessment that is not contested is due when the violator is served with a notice of assessment. An assessment that is contested is due at the conclusion of the administrative and judicial review of the assessment. Consistent with G.S. 115C-437, the State Controller shall pay the clear proceeds of civil penalties collected under this section to the County School Fund in the county in which the person charged with the violation resides. The State Controller shall reduce the monies collected by the enforcement costs and the collection costs to determine the clear proceeds payable to the County School Fund. Monies set aside for the costs of enforcement and the costs of collection shall be credited to accounts of the State Board of Elections.

(b) The State Board of Elections may waive a late penalty if it determines there is reasonable cause.

1997 N.C. SESSION LAWS CH. 515, § 4(e)

EXPANDED REPORTING IN LOCAL ELECTIONS AND REFERENDA; $3,000 THRESHOLD FOR ALL REPORTING.

Section 4. (e) G.S. 163-278.10A reads as rewritten:

"*§ 163-278.10A. Threshold of ~~$1,000.00~~ $3,000 for Financial Reports.*

(a) Notwithstanding any other provision of this Chapter, a candidate shall be exempted from the reports of contributions, loans, and expenditures required in G.S. 163-278.9(a), 163-278.40B, 163-278.40C, 163-278.40D, and 163-278.40E if to further his campaign that candidate:

(1) Does not receive more than ~~one~~ three thousand dollars (~~$1,000.00~~) ($3,000) in contributions, and

(2) Does not receive more than ~~one~~ three thousand dollars (~~$1,000.00~~) ($3,000) in loans, and

(3) Does not spend more than ~~one~~ three thousand dollars (~~$1,000.00~~) ($3,000).

To qualify for the exemption for those reports, the candidate's treasurer shall file a certification under oath that he does not intend to receive in contributions or loans or expend more than ~~one~~ three thousand dollars (~~$1,000.00~~) ($3,000) to further his campaign. The certification shall be filed with the Board at the same time the candidate files his Organizational Report as required in G.S. 163-278.7, G.S. 163-278.9, and G.S. 163-278.40A. If the candidate's campaign is being conducted by a

political committee which is handling all contributions, loans, and expenditures for his campaign, the treasurer of the political committee shall file a certification of intent to stay within the threshold amount. If the intent to stay within the threshold changes, or if the ~~$1,000~~ three thousand dollar ($3,000) threshold is exceeded, the treasurer shall immediately notify the Board and shall be responsible for filing all reports required in G.S. 163-278.9 and 163-278.40B, 163-278.40C, 163-278.40D, and 163-278.40E; provided that any contribution, loan, or expenditure which would have been required to be reported on an earlier report but for this section shall be included on the next report required after the intent changes or the threshold is exceeded.

(b) The exemption in subsection (a) of this section applies to political party committees under the same terms as for candidates, except that the term 'to further his campaign' does not relate to a political party committee's exemption, and all contributions, expenditures, and loans during an election shall be counted against the political party committee's threshold amount."

(f) This section applies to primaries, elections, and referenda beginning in 1998.

1997 N. C. SESSION LAWS CH. 515, § 11A(a)

DISCLOSURE OF SPENDING FOR MATERIAL THAT NAMES CANDIDATES.

Section 11. (a) Article 22A of Chapter 163 of the General Statutes is amended by adding a new section to read:

"§ 163.278.12A. *Disclosure of spending for material that names candidates.*

(a) General Duty to Report. – Any individual, person, political committee, or other entity that makes an expenditure for printed material or advertisements broadcast or distributed to anyone other than members of the entity shall report those expenditures in accordance with subsection (b) of this section if the printed material or advertisement names a candidate or names an individual whose prospective or potential candidacy is the principal purpose of a political committee. The disclosure requirements of this section do not apply to the following:

(1) Material that is solely informational and is not intended to advocate the election or defeat of a candidate or prospective candidate; or

(2) The owner of a newspaper, magazine, radio outlet, or television outlet, if that owner is not a candidate, political committee, or the parent entity of a political committee under G.S. 163-278.19.

(b) Procedures for Reporting; Exceptions. – Any political committee or other entity otherwise required by this Article to file reports with a board of elections shall include an

expenditure described in subsection (a) of this section on those reports. Any entity not otherwise required by this Article to file reports shall report expenditures described in subsection (a) of this section to the State Board of Elections within 10 days after the aggregate expenditure has reached the lowest threshold amount set for candidates and political party committees in G.S. 163-278.10A. After the initial report, each entity shall report subsequent expenditures described in subsection (a) of this section according to the schedule set out in G.S. 163-278.9(a) or Part 2 of this Article, whichever is appropriate.

(c) Definition. – For the purpose of this section, notwithstanding G.S. 163.278.6(9), the term 'expenditure' means any purchase, advance, conveyance, deposit, distribution, transfer of funds, loans, payment, gift, pledge, or subscription of money or anything of value whatsoever, whether or not made in an election year, and any contract, agreement, promise, or other obligation, whether or not legally enforceable. An individual or entity is deemed to have made an expenditure for printed material or advertisements if that individual or entity has agreed to compensate another individual or entity for purchasing such printed material or advertisements.

(d) No Criminal Liability. – No duty imposed by this section alone, and by no other law, shall be relied upon or otherwise interpreted to create criminal liability for any person."

TRANSCRIPT EXCERPT OF HEARING HELD JULY 10, 1998

The Court: What's the purpose of the communications in question if they are not to defeat specifically representative Cindy, whatever her name was.

Mr. Bopp: Some of the advertisements were run with respect to Representative Cindy Watson. The overall purposes of Farmers for Fairness is to lobby both the legislature and the public in order to ensure that hog farmers receive fair treatment in terms of legislative action.

The Court: But the specific advertisements with regard to her, don't you have to candidly admit the purpose was to defeat her?

Mr. Bopp: We admitted in our pleadings both the purpose and effect of such advertisements would be to influence her election. We admitted that in our pleadings.

The Court: Does that mean yes to my question?

Mr. Bopp: So the answer is yes.

(2)

No. 00-1092

Supreme Court, U.S.
FILED
2001
CLERK

IN THE

Supreme Court of the United States

GARY O. BARTLETT, in his official capacity as Executive Director of the State Board of Elections of the State of North Carolina; LARRY LEAKE, in his official capacity as Chairman of the State Board of Elections; S. KATHERINE BURNETTE, in her official capacity as Secretary of the State Board of Elections; JUNE K. YOUNGBLOOD, DOROTHY PRESSER, FAIGER M. BLACKWELL, in their official capacity as Members of the State Board of Elections; MICHAEL F. EASLEY, Attorney General of the State of North Carolina; COLON WILLOUGHBY, in his official capacity as District Attorney for the 10th Judicial District; WILLIAM H. ANDREWS, in his official capacity as District Attorney for the 4th Judicial District; and C. BRANSON VICKORY, III, in his official capacity as District Attorney for the 8th Judicial District,

Petitioners,

v.

WILLIAM BRYANT PERRY;
FARMERS FOR FAIRNESS, INCORPORATED

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

James Bopp, Jr.*
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, IN 47807
(812) 232-2434

Alan P. Dye
Heidi K. Abegg
Webster, Chamberlain & Bean
1747 Pennsylvania Ave., N.W.
Suite 1000
Washington, D.C. 20006
(202) 785-9500

Counsel for Respondents
**Counsel of Record*

Balmar Legal Publishing Services, Washington, DC 202-682-9800

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QUESTION PRESENTED

Whether the court of appeals correctly held that North Carolina's statute is unconstitutionally overbroad because it obliterates *Buckley v. Valeo's* bright-line express advocacy test by permitting regulation of communications that simply name a candidate, are not solely informational and where the stated subjective intent of the speaker is to support or oppose a candidate.

PARTIES TO THE PROCEEDING

Gary O. Bartlett, Larry Leake, June K. Youngblood, Dorothy Presser, Rose Vaughn Williams, and Dawn Baxton, in their official capacities as Executive Secretary-Director, Chairman, and members of the North Carolina State Board of Elections, Michael F. Easley in his official capacity as Attorney General of North Carolina, and other defendant district attorneys are petitioners in this case and were defendants-appellants below.

Farmers for Fairness, Inc. is a trade association of corporations and individuals involved in the production of hogs, and William Bryant Perry is an individual who benefits from, and wishes to continue to benefit from, advertisements sponsored by Farmers for Fairness, Inc. Farmers for Fairness, Inc. and William Bryant Perry are respondents in this case and were plaintiffs-appellees below.

CORPORATE DISCLOSURE

There is no parent or publicly held company owning 10% or more of stock in Farmers for Fairness, Inc.

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The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 231 F.3d 155 (4th Cir. 2000), and the order of the court of appeals amending its opinion (Pet. App. 23a) is reported at 231 F.3d 155 (4th Cir. 2000). The opinion of the district court (Pet. App. 25a-34a) is reported at 1999 U.S. Dist. LEXIS 5881 (E.D.N.C. 1999). The opinion of the district court on the motion to reconsider (Pet. App. 35a-46a) is unreported. The order of the North Carolina State Board of Elections (Pet. App. 47a-65a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 3, 2000 (Pet. App. 67a). The petition for writ of certiorari was filed on January 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First (Pet. App. 69a) and Fourteenth Amendments to the Constitution of the United States and the relevant provision of the North Carolina Revised Statutes, N.C. GEN. STAT. § 163-278.12A (Pet. App. 71a-72a) are set forth in the Petitioner's Appendix.

STATEMENT OF THE CASE

A. Procedural Background

North Carolina General Statute § 163-278.12A regulates political expression by placing a duty to report on any individual, person or political committee that makes an expenditure, whether or not in an election year, for printed material or advertisements broadcast or distributed if the printed material or advertisement names a candidate. There is an exception to this general duty to disclose for material that is solely informational and where there is no subjective intent

to advocate the election or defeat of a candidate or prospective candidate.

Farmers for Fairness, Inc. and William Bryant Perry (respondents) brought a facial challenge to § 163-278.12A on the grounds that the statute was vague and overbroad for unconstitutionally permitting the regulation of protected issue discussion by redrawing the bright-line definition of the express advocacy test laid down by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). Respondents also challenged a second statute which the Court of Appeals for the Fourth Circuit held was facially unconstitutional in a separate case after this action was filed. *See North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1156 (2000) (Court denying certiorari on an issue unrelated to this case).

Petitioners are incorrect in stating that respondents sought an injunction prohibiting enforcement of an order entered by the North Carolina State Board of Elections; rather, respondents sought to enjoin enforcement of the statutes at issue. Pet. App. 8a. The district court, in ruling on cross-motions for summary judgment, found the challenge to § 163-278.12A to be mooted by the Fourth Circuit's ruling in *North Carolina Right to Life*, but permanently enjoined the State from enforcing the statute. Pet. App. 32a. The district court denied petitioners' motion to reconsider the ruling on mootness. Pet. App. 37a.

Petitioners appealed, and the court of appeals held that the district court erred in ruling that the constitutionality of § 163-278.12A was mooted by its decision in *North Carolina Right to Life*. Pet. App. 9a-10a. The Fourth Circuit addressed the constitutionality of the statute and concluded that it was unconstitutional, noting this Court's "effort to alleviate uncertainty" by "adopt[ion] of a bright-line rule to determine when political expression may be regulated." Pet. App. 10a. The court of appeals found that "[t]his bright-line rule requires the use of express or explicit words of advocacy of the election or defeat of a candidate before the

communication may be regulated." Pet. App. 10a (citing *Buckley v. Valeo*, 424 U.S. 1, 42 (1976)).

Noting several other circuit and district court decisions "categorically rejecting any attempt to dilute the bright-line express advocacy standard," Pet. App. 13a, the Fourth Circuit continued its "steadfast[] adhere[nce] to the bright-line 'express advocacy' test from *Buckley*," Pet. App. 11a, and refused to "recognize an exception to the 'express advocacy' test when the entity admits, outside of the advertisement, that it is trying to defeat a particular candidate." Pet. App. 12a. Otherwise, the speaker is "'wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" Pet. App. 13a (quoting *Buckley*, 424 U.S. at 43).

Furthermore, the court of appeals found that under the State's test, it was unclear which statements of intent made outside the context of an advertisement would leave the entity subject to regulation, and whose statement of intent could bind the organization. Pet. App. 13a. Therefore, the court "decline[d] the State's offer to abandon the rule of *Buckley* and to allow the State of North Carolina to regulate political expression, which on its face is issue advocacy, when the speaker acknowledges an intent to influence the outcome of an election." Pet. App. 13a-14a. Accordingly, the court of appeals found § 163-278.12A unconstitutionally overbroad and permanently enjoined the State from enforcing it. Pet. App. 14a.

B. Factual Background

The North Carolina State Board of Elections conducted a hearing to investigate allegations by an individual that was a subject of Farmers for Fairness, Inc.'s issue advertisements. The Board's findings can be found at Pet. App. 47a-65a. Farmers for Fairness, Inc. had been running issue advertisements that were critical of the positions several legislators had taken on agricultural issues. Pet. App. 52a-55a. These advertisements, as petitioners readily admit, did

not contain explicit or express words of advocacy, as described in *Buckley*. Pet. App. 12a. Petitioners erroneously state that the purpose of the advertisements was to defeat a specific legislator; rather, Farmers for Fairness, Inc. admitted that "both the purpose and effect of such advertisements would be to *influence* her election." Pet. App. 79a (emphasis added).

REASONS FOR DENYING THE PETITION

The court of appeals was correct in holding that express words of advocacy are required to be contained within a communication before such speech may be regulated. This holding is compelled by this Court's decision in *Buckley* and does not conflict with any decision of this Court or of any other court of appeals. No reason therefore exists for this Court to review this case or reexamine the contours of the express advocacy test. Indeed, the Court has twice since *Buckley* denied petitions for writs of certiorari in cases raising such issues. *See Maine Right to Life Comm. v. Federal Election Comm'n*, 522 U.S. 810 (1997); *Faucher v. Federal Election Comm'n*, 502 U.S. 820 (1991).

I. THE COURT OF APPEALS' HOLDING THAT EXPRESS WORDS OF ADVOCACY MUST BE CONTAINED WITHIN A COMMUNICATION BEFORE SUCH SPEECH MAY BE REGULATED DOES NOT MERIT THIS COURT'S REVIEW.

The court of appeals correctly held (Pet. App. 13a) that permitting the regulation of speech based on a speaker's intent "would create a legal standard that would be the antithesis of the bright-line express advocacy test developed in *Buckley*." The court of appeals' adherence to *Buckley's* bright-line is consistent with every other federal court to consider the issue, for as the court of appeals noted, "[i]t is therefore clear that courts have only allowed regulation of campaign speech when there are words of express advocacy in the communication itself." Pet. App. 12a.

A. The court of appeals' decision is compelled by this Court's precedential decisions in *Buckley v. Valeo* and *Federal Election Commission v. Massachusetts Citizens for Life.*

As the court of appeals correctly stated, petitioners' argument is "undermined by *Buckley* and its progeny." Pet. App. 13a. This Court in *Buckley* developed the "express advocacy" test in order to place constitutional limits on two challenged provisions of the Federal Election Campaign Act: (1) then-section 608(e)(1), which placed a $1,000 annual cap on "expenditure[s] relative to a clearly-identified candidate," *Buckley*, 424 U.S. at 39, and (2) then-section 434(e), which required persons making expenditures "aggregating over $100 in a calendar year . . . to file a statement with the Commission." *Id.* at 75. The *Buckley* Court found that in the absence of a constitutionally-mandated narrowing construction, both of these provisions would be unconstitutional on the basis of vagueness and overbreadth.[1]

Buckley's narrowing construction of the statutory phrase "relative to" was required because

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are often intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42. Therefore, to ameliorate this problem, the *Buckley* Court settled on the "express advocacy" standard as the line of demarcation between the protected and the regulable.

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[1] *Buckley* itself did not expressly rely on overbreadth, but was characterized as such in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248 (1986).

The *Buckley* Court, in drawing this line, found that only communications "that include explicit words of advocacy of election or defeat of a candidate," *id.* at 43, or "contain[] express words of advocacy of election or defeat," *id.* at 44 n.52, could be regulated. In *Buckley's* famous footnote, the Court provided an illustrative list of which terms could be "express words of advocacy:" "'vote for', 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

This bright-line distinction was necessary the *Buckley* Court reasoned because

> whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation . . . . and . . . puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Therefore, the Court found that "[t]he constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.*

Similarly, with respect to then-section 434(e), the *Buckley* Court found that the phrase, "for the purpose of influencing" an election, which defined an "expenditure" which must be reported to the Federal Election Commission if more than $100, "shares the same potential for encompassing

both issue discussion and advocacy of political result." *Id.* at 79. As a result, "[t]o insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditures' . . . to reach only funds for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. "As narrowed, § 434(e) . . . does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result," *id.*, and is thus "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Id.* at 81.

The only other case in which this Court has applied the "express advocacy" test is *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). The Court stated that "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Id.* at 249. The *MCFL* Court unanimously reaffirmed *Buckley's* "express advocacy" test, holding that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b," which prohibits corporate contributions and expenditures in connection with a federal election. *Id.* Citing to footnote 52 in *Buckley*, the Court reiterated its holding that "a finding of 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc." *Id.* (quoting *Buckley*, 424 U.S. at 44 n.52).

Therefore, *Buckley* and *MCFL* when read together establish a bright-line express advocacy test prohibiting regulation of speech, i.e., issue advocacy, unless a clear directive to vote and a clearly identified candidate lie within the four corners of the communication.

The court of appeals correctly determined that the outcome of this case is compelled by *Buckley* and then correctly applied this Court's precedents. First, the court of appeals correctly stated that *Buckley's* "bright-line rule requires the use of express or explicit words of advocacy of

the election or defeat of a candidate before the communication may be regulated." Pet. App. 10a (citing *Buckley*, 424 U.S. at 42). Continuing, the court of appeals noted this Court's statement in *Buckley* that "'the distinction between discussion of issues and candidates and advocacy of issues and candidates may often dissolve in practical application.'" *Id.* (quoting *Buckley*, 424 U.S. at 42). It was the ability of issue and candidate discussion to blur, the court of appeals observed, that was the reasoning behind this Court's refusal "to adopt a standard allowing regulation of any advertisement that mentions a candidate's stand on an issue." Pet. App. 10a (citing *Buckley*, 424 U.S. at 42-43).

Noting that Farmers for Fairness, Inc.'s "communications in and of themselves are not 'express advocacy' of the kind described in *Buckley*," the court refused to adopt the State's argument that as long as the entity admits the purpose of the advertisement is to defeat a candidate, the communication meets *Buckley's* express advocacy test. Pet. App. 12a. The court found that express words of advocacy within a communication are required before speech may be subject to regulation because under the petitioners' test it would be "unclear which statements of intent made outside the context of an advertisement would leave the entity subject to regulation under North Carolina law." Pet. App. 13a. "Discerning the 'intent' of an organization thus can be problematic," and therefore, "[c]ertain groups might be disinclined to engage in political speech, fearful that someone in the group would make a public statement of the group's intent in a particular ad, thus subjecting the group to regulation." Pet. App. 13a. Like the statute in *Buckley*, such a test "would leave the speaker 'wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" Pet. App. 13a (quoting *Buckley*, 424 U.S. at 43). Thus, § 163-278.12A creates, rather than "alleviate[s] [the] uncertainty" that led to the Supreme Court's adoption of "a bright-line rule to determine when political expression may be regulated." Pet. App. 10a. In short, the court of appeals

found that § 163-278.12A "would create a legal standard that would be the antithesis of the bright-line express advocacy test developed in *Buckley*." Pet. App. 13a. The court of appeals thus found North Carolina's statute unconstitutional and enjoined its enforcement. Pet. App. 14a.

B. All other federal courts have consistently required communications to meet *Buckley's* constitutionally-mandated express advocacy test before permitting regulation of speech.

The court of appeals' decision does not conflict with any decision of this Court or of any court of appeals, and is overwhelmingly consistent with the decisions of numerous district courts. *See* Pet. App. 12a ("It is therefore clear that courts have only allowed regulation of campaign speech when there are words of express advocacy in the communication itself."). Both courts below, consistent with every court of appeals that has addressed the issue, correctly held that replacing the express words of advocacy test with an intent test obliterates the bright-line established in *Buckley* as constitutionally required. Courts have found the bright-line is required both to establish a line of demarcation between the protected and the regulated, and to prevent government from regulating protected issue advocacy. *See generally* Bopp & Coleson, *The First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U. West L.A. L. Rev. 1 (1997). Petitioners cite no decision of any federal court, and we are aware of none, straying from the bright-line test by adopting a subjective intent test. Further review is therefore not warranted.

The federal appellate courts that have applied *Buckley* and *MCFL* have faithfully adhered to the "explicit" or "express" words of advocacy test according to its plain terms and have refused to broaden the definition of express advocacy. *See Florida Right to Life v. Lamar*, 2001 U.S. App. LEXIS 613 (11th Cir. Jan. 17, 2001) (affirming *per curiam*, the district court's holding that express words of advocacy are required before allowing government regulation

of speech); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 2000 U.S. App. LEXIS 33727, at *47-48 (10th Cir. Dec. 26, 2000)(finding a statute unconstitutional which regulated communications which "unambiguously refers to such candidate" because the statute could not be construed to reach only communications which contained explicit words advocating the election or defeat of a clearly identified candidate); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387, 388 (2d Cir. 2000) (court finding two disclosure statutes unconstitutional for reaching "advocacy with respect to public issues, which is a violation of the rule enunciated in *Buckley* and its progeny."); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999) (court finding definition of "political committee" overbroad because it included organizations that merely wished to influence an election through issue advocacy); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) ("Questions of intent and effect, however, are to be excluded from the [express advocacy] analysis, since a speaker, in such circumstances, could not safely assume how anything he might say would be understood by others."); *Virginia Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 274 (4th Cir. 1998)(court finding phrase "for the purpose of influencing the outcome of any election "may be narrowly construed to limit the application of those statutes to groups that expressly advocate the election or defeat of a clearly identified candidate."); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998)("Because of the vital importance in protecting such speech, the Buckley Court articulated what has come to be known as the 'express advocacy' test. . . ."); *Federal Election Comm'n v. Christian Action Network*, 110 F.3d 1049, 1062 & n.12 (4th Cir. 1997)(The *Buckley* Court was clear "that it meant by the phrase 'express advocacy' nothing more or less than 'express words of advocacy' . . . . [T]he Court never suggested that communications with no words of advocacy at all can nonetheless be considered 'express advocacy.'"); *Federal Election Comm'n v. Christian Action*

Network, 894 F. Supp. 946, 948 (W.D. Va. 1995) (holding that ads that did not contain "explicit words or imagery advocating electoral action" constituted protected issue advocacy and not electioneering subject to regulation), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996); *Maine Right To Life Comm. v. Federal Election Comm'n*, 914 F. Supp. 8, 12 (D. Maine 1996) ("What the Supreme Court did [in adopting the 'express advocacy' test] was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues."), *aff'd per curiam*, 98 F.3d 1 (1st Cir.)("[W]e affirm for substantially the reasons set forth in the district court opinion."); *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 472 (1st Cir. 1991)("In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*."); *Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980)(*en banc*) (FEC's definition of "expressly advocating the election or defeat" effectively included "implied" advocacy and was, therefore, "totally meritless.").[2]

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[2] Likewise, federal district courts have rejected tests permitting regulation of speech based on intent, context, or name or likeness, and instead have held that before a communication may be regulated, it must contain express or explicit words of advocacy. *See Federal Election Comm'n v. Christian Coalition*, 52 F. Supp.2d 46, 61 (D.D.C. 1999) (holding that under the express advocacy test, the communication "must in effect contain an explicit directive" which "is determined first and foremost by the words used."); *Kansans for Life, Inc. v. Gaede*, 38 F. Supp.2d 928, 935-37 (D.Kan. 1999) (enforcement policy of state was unconstitutionally vague where it did not restrict regulation to advertisements containing express advocacy); *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp.2d 766 (regulation prohibiting corporate communications containing the "name or likeness of a candidate" within 45 days of an election facially overbroad); *Planned Parenthood Affiliates of Mich., Inc. v. Miller*, 21 F. Supp.2d 740 (E.D. Mich. 1998)(same); *Right to Life of Dutchess County, Inc. v. Federal Election Comm'n*, 6 F. Supp.2d

Even *Federal Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), often cited as the lone possible dissenter, found that express advocacy must be contained within the message itself and that the intent of the speaker is irrelevant:

> [h]aving established that the emphasis must always be on the literal words of the communication, with little if any weight accorded external contextual factors . . . . the [*Furgatch*] court repeatedly emphasized that the message of candidate advocacy

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248 (S.D.N.Y. 1998)(FEC's contextual definition of "expressly advocating" facially overbroad); *Clifton v. Federal Election Comm'n*, 927 F. Supp. 493, 496 (D. Maine 1996)("[T]he United States Supreme Court explicitly has narrowed FECA's very broad prohibition against corporate election-related spending to a prohibition on spending involving express advocacy of the election or defeat of a clearly identified candidate or candidates. . . . The Court has ruled that spending for issue advocacy, on the other hand, cannot be stopped."), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *West Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954, 959 (S.D.W.Va. 1996)("[*Buckley* and *MCFL*] adopted a bright-line rule for determining whether advocacy is express advocacy and therefore subject to regulation, or issue advocacy which may not be regulated."); *Federal Election Comm'n v. Survival Educ. Fund, Inc.*, 1994 WL 9658, at *3 (S.D.N.Y. Jan. 12, 1994) ("[E]xpressions of hostility to the positions of an official, implying that the official should not be reelected -- even when the implication is quite clear -- do not constitute [] express advocacy. . . ."), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1456 (D. Colo. 1993)("Trying to determine whether the surrounding circumstances, coupled with the implications of the advertisement, constitute 'express advocacy' leads to the type of semantic dilemma which the [Supreme] Court sought to avoid by adopting the bright-line rule."), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 116 S. Ct. 2309 (1996); *Federal Election Comm'n v. NOW*, 713 F. Supp. 428 (D.D.C. 1989)(solicitation letters, which criticized candidates, were discussions of public issues which by their nature raised the names of candidates and therefore, were not express advocacy); *Federal Election Comm'n v. AFSCME*, 471 F. Supp. 315, 317 (D.D.C. 1979)("[A]lthough the poster includes a clearly identified candidate and may have tended to influence voting, it contains communication on a public issue widely debated during the campaign. As such, it is the type of political speech which is protected from regulation. . . .").

> must appear in the speech, in the words, of the communication if the expenditure of corporate funds for that communication is to be prohibited. . . . The court's almost exclusive focus on "speech," and specifically "speech" defined as the literal words or text of the communication, could not have been any clearer. . . .

Christian Action Network, 110 F.3d at 1053 (quotations and citations omitted). Therefore, there is no conflict in the circuits and further review of this case is not warranted.

II. THERE IS NO REASON FOR THIS COURT TO REVISIT ITS DECISION IN *BUCKLEY V. VALEO*.

Petitioners erroneously argue that the *Buckley* Court crafted the express advocacy test to be a "proxy for intent" (Pet. App. 12), and therefore, the *Buckley* Court did not intend that its decision would foreclose regulation of electoral advocacy perceived to be masquerading as issue discussion. However, the twenty-five year old *Buckley* decision does not merit revisiting for two reasons.

A. The decision below was correctly decided.

Petitioners suggest that the decision below distorts *Buckley*, in a manner not contemplated by this Court, and further encourages "covert speech" (Pet. App. 20) because speakers can avoid using express words of advocacy while discussing the issues and therefore, avoid disclosure requirements. Far from finding such speech "covert," the *Buckley* Court put its imprimatur on issue discussion that influences the election or defeat of a candidate:

> [s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.

Buckley, 424 U.S. at 45. Later, the *Buckley* Court reiterated its command that partisan issue advocacy remain unfettered even though it may influence an election:

> As narrowed, § 434(e), like § 608(e)(1), does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result.

Id. at 80. The *Buckley* Court presciently recognized that its bright-line test might result in circumvention, but nonetheless found that only the bright-line standard would guarantee protection of the discussion of issues:

> [t]he exacting interpretation of the statutory language necessary to avoid constitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign.

Id. at 45. As the above quoted *Buckley* passages show, the Court put its approval on speech that supports or criticizes candidates as long as such speech avoids express words of advocacy.

Therefore, as the *Buckley* Court has already addressed petitioners' argument, further review of this case is not warranted. Petitioners also cite no authority supporting their position, nor do they identify any persuasive reasons for this Court to reconsider the settled legal principles set out in *Buckley* on which scores of courts have relied.

Petitioners also argue that *Buckley* does not foreclose their reliance upon intent to determine whether electoral advocacy has occurred. However, *Buckley* dismisses this argument as well, foreclosing the need for further review of this case. The *Buckley* Court stated that the "constitutional deficiencies described in *Thomas v. Collins*," which are shared by the statute at issue in this case,

> can be avoided *only* by reading § 608(e)(1) as limited to *communications* that *include* explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly identified" in § 608(e)(2) requires that an explicit and unambiguous reference to the candidate appear as part of the *communication*.

Buckley, 424 U.S. at 43 (emphases added). The Court's choice of words belies petitioners' argument. The constitutional deficiencies in this case "can be avoided *only* by" permitting government regulation of "communications that in express terms advocate the election or defeat of a clearly identified candidate." *Id.* at 44 (emphasis added). The phrase "that in express terms," tells us which communications are subject to regulation. Therefore, only communications that actually contain these express terms advocating the election or defeat of a clearly identified candidate may be subject to regulation.

Buckley's footnote 52 also lends support to this construction. The Court provided an illustrative list of what would meet its requirement of "express terms." The *Buckley* Court stated that "[t]his construction would restrict the application of § 608(e)(1) to communications *containing* express *words* of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52 (emphases added). Thus, the *Buckley* Court's choice of language supports, and indeed requires, the court of appeals' holding that express words of advocacy must be contained

within a communication before it may be subject to regulation in the form of disclosure.

Not only has this Court previously addressed petitioners' arguments, the *Buckley* Court correctly decided them. To implement its holding that the discussion of issues, vital to our democracy, remain constitutionally protected, the *Buckley* Court crafted two tests: the express advocacy test and the major purpose test. To prevent chill on the discussion of issues by allowing a speaker to know in advance whether his speech is protected, and to prevent government from regulating issue discussion, the *Buckley* Court created a test that would examine whether the speaker was *actually* engaged in electoral advocacy. As in *MCFL*, a speaker can engage in electoral advocacy without intending to do so. But to determine whether actual express advocacy has occurred, the court of appeals, consistent with *Buckley*, required that a communication contain express words of advocacy, lest the speaker be at the mercy of the varied hearers and refrain from speaking. Thus, not only did the *Buckley* Court answer petitioners' arguments, it did so correctly, in a manner that fully protects the discussion of issues. Therefore, the court of appeals' decision was correctly decided and further review is not warranted.

B. Principles of *stare decisis* apply.

Petitioners contend (Pet. App. 20) that this Court should "revisit" its decision in *Buckley*, supra. Although "stare decisis is not an inexorable command, particularly when [the Court is] interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000) (citations and internal quotation marks omitted). Petitioners have failed to identify any "special justification" that would warrant reconsideration of *Buckley*.

This doctrine applies with special persuasive force in this case where there are over twenty-five cases that have based their holdings upon *Buckley's* requirement that express words of advocacy be contained within a communication. Furthermore, the Federal Election Campaign Act, 2 U.S.C. § 431(9), the Code of Federal Regulations, 11 CFR § 100.22, and numerous state statutes, *e.g.*, Ariz. Rev. Stat. § 16-901.01 (2000)(defining express advocacy); Iowa Code § 56.2(14) (2000)(defining express advocacy); Ky. Rev. Stat. § 121.015(12)(2000); N.H. Rev. Stat. Ann. § 664:2(XI)(2000); Or. Rev. Stat. § 260.005(8)(c)(2000); W. Va. Code § 3-8-2(c)(2000), base their definitions of expenditure and independent expenditure upon *Buckley's* holding that the only way to determine whether speech is electoral advocacy, without violating the First Amendment, is whether a communication itself contains express words of advocacy. Therefore, principles of *stare decisis* apply here and no special justification exists for the Court to revisit its decision in *Buckley*.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

JAMES BOPP, JR.
Counsel of Record

BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807
(812) 232-2434

Alan P. Dye
Heidi K. Abegg
Webster, Chamberlain & Bean
1747 Pennsylvania Ave., N.W.
Suite 1000
Washington, D.C. 20006
Counsel for Petitioners

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